No. 88-5986-ASY
Status: GRANTED

Title: Clyde Osborne, Appellant
v.
Ohio

Docketed:
November 14, 1988

Court: Supreme Court of Ohio

Counsel for appellant: Shank,S. Adele

Counsel for appellee: O'Brien,Ronald J.

Entry	Date	Note	Proceedings and Orders
1	Nov 14 1988	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
3	Dec 13 1988		Motion of appellee Ohio to dismiss or affirm filed.
4	Dec 22 1988		DISTRIBUTED. January 13, 1989
5	Dec 30 1988	X	Reply brief of appellant Clyde Osborne filed.
8	Jun 26 1989		PROBABLE JURISDICTION NOTED. limited to Questions I.(b), I.(d) and II. presented by the statement as to the jurisdiction. With respect to the additional questions presented, the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.
			**********
9	Aug 3 1989		Joint appendix filed.
11	Aug 7 1989		Order extending time to file brief of appellant on the merits until August 18, 1989.
12	Aug 10 1989		Brief amici curiae of Concerned Women for America, et al. filed.
14	Aug 18 1989		Brief of appellant Clyde Osborne filed.
13	Aug 22 1989		Record filed.
		*	Supreme Court of OH-2 vol.
15	Sep 7 1989		Brief amicus curiae of American Family Association, Inc. filed.
16	Sep 7 1989		Brief amicus curiae of Children's Legal Foundation filed.
18	Sep 14 1989		Brief amici curiae of Attorneys General for the States of Arizona, et al. filed.
17	Sep 15 1989		Brief of appellee Ohio filed.
19	Sep 18 1989		Brief amici curiae of Covenant House, et al. filed.
20	Sep 26 1989		SET FOR ARGUMENT TUESDAY, DECEMBER 5, 1989. (4TH CASE)
21	Sep 29 1989		CIRCULATED.
22	Oct 16 1989	X	Reply brief of appellant Clyde Osborne filed.
23	Dec 5 1989		ARGUED.

No. 88-5986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO
JURISDICTIONAL STATEMENT

S. ADELE SHANK
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394
Counsel of Record

John Quigley
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

David Goldberger
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

COUNSEL FOR APPELLANT

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QUESTIONS PRESENTED

I. Ohio Revised Code 2907.323(A)(3) prohibits, except by those having a proper purpose, the possession or viewing of nudity-oriented material which depicts a minor. The Ohio Supreme Court construed O.R.C. 2907.323(A)(3) in light of a challenged based on vagueness, overbreadth, and invasion of First Amendment rights of speech and privacy, to define the word "minor," to add an element of scienter, and to limit the prohibited materials to those depicting minors in lewd exhibition or graphic focus on the genitals. It construed "proper purpose" to mean a morally innocent purpose. The questions presented are:

(a) Whether a court may construe a statute so that the legislative purpose is no longer served;

(b) Whether a state may prohibit the private possession of child nudity-oriented materials where the nudity consists of a lewd exhibition or graphic focus on the genitals;

(c) Whether recklessness is sufficient scienter to justify punishment for possession or viewing of child nudity-oriented materials;

(d) Whether possession of such material may be prohibited consistent with First Amendment rights of speech;

(e) Whether "proper purposes," construed as morally innocent purposes, gives adequate notice of the conduct allowed and/or prohibited under a statute that is otherwise overbroad, vague, and violative of First Amendment rights of speech and privacy;

(f) Whether defining the materials which may not be possessed or viewed to include depiction of legal acts that are not obscene gives adequate notice of the nature of the materials prohibited.

II. Whether, where a statute prohibiting possession or viewing of depictions of nude minors is vague, overbroad and violates First Amendment rights of speech and privacy, a state supreme court may apply retroactively to a person convicted under such statute its own construction, where that construction substantially re-writes the statute.

III. One element of the offense of possessing nudity-oriented materials under R.C. 2907.323(A)(3) is that the photographs or performances possessed or viewed depict minors. The Ohio Supreme Court ruled that the photographs at issue in a prosecution under R.C. 2907.323(A)(3) are admissible automatically because they are the basis of the prosecution, and that the unauthenticated photographs may serve as the only evidence of the photographic subject's minority. The questions presented as a result of this ruling are:

(a) Whether the court may create a presumption of minority based upon the subject's appearance in the photographs which are the basis of the prosecution?

(b) Whether the court may place the burden on the accused to prove the absence of minority?

(c) Whether a lesser standard of proof may be used in prosecutions of child-nudity oriented prosecutions?

IV. Whether, consistent with the Fourth Amendment, material may be introduced in evidence after being seized on the basis of a search warrant based on triple hearsay that does not indicate a basis for believing the informants credible, and where the informants' statements do not indicate that the material is in the place to be searched or how recently the informants believe the owner of the place to have been in possession of the materials.

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OPINIONS BELOW

State of Ohio v. Osborne, Court of Appeals, Franklin County, Ohio, Case No. 85AP-945

State of Ohio v. Young, State of Ohio v. Osborne, 37 Ohio St. 3d 249 (1988)

GROUNDS OF JURISDICTION

This is an appeal from a judgment of conviction rendered against Appellant in the Ohio Supreme Court, and from that court's refusal to re-hear its judgment. The Ohio Supreme Court affirmed Appellant's conviction under Ohio Revised Code 2907.323(A)(3).

The Ohio Supreme Court entered its Judgment on July 6, 1988, and its entry denying Appellant's request for re-hearing on August 31, 1988.

Appellant filed Notice of Appeal to this Court in the Ohio Supreme Court November 10, 1988.

Jurisdiction is grounded on 28 U.S.C. sec. 1257(2), since Appellant draws in question the validity, under the United States Constitution, of Ohio Revised Code 2907.323(A)(3), and of the Ohio Supreme Court's decision in the case at bar in favor of its validity.

Jurisdiction over this appeal is not affected by Public Law 100-352, June 27, 1988, 102 Stat. 662, which amends 28 U.S.C. sec. 1257(2). The Ohio Supreme Court's denial of a re-hearing was entered August 31, 1988. Sec. 7 of P.L. 100-352 indicates that P.L. 100-352 takes effect ninety days after June 27, 1988, which means September 25, 1988, and that it "shall not...affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

OHIO REVISED CODE 2907.323(A)(3)

ILLEGAL USE OF MINOR IN NUDITY-ORIENTED MATERIAL OR PERFORMANCE.

(A) No person shall do any of the following:

...

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or causes to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;...

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

Appellant, Clyde Osborne, a sixty-one-year-old man, had three polaroid photographs and one snapshot on page twelve of his personal photo album in the drawer of the desk in the bedroom of his own house. (R. 66) He was prosecuted for the possession of those photographs. Mr. Osborne was charged with the possession of nudity-oriented materials depicting a minor, a misdemeanor of the first degree under Ohio Revised Code sec. 2907.323(A)(3). Mr. Osborne entered a plea of not guilty.

Prior to trial, Mr. Osborne challenged the search warrant which had resulted in the discovery of the photographs, on the grounds that it was based on unreliable triple hearsay and failed to establish that the evidence sought was likely to be in his home at the time. (R. 33-40). Mr. Osborne also challenged in a motion *in limine* the admissibility of the photographs for the purpose of proving the age of the person depicted. (R. 14-17). Mr. Osborne also challenged the constitutionality of O.R.C. 2907.323(A)(3) on the grounds that it was vague and overbroad and infringed upon his First Amendment rights. (R. 3-7). The trial court overruled each of these pre-trial motions.

Mr. Osborne was tried before a jury of eight. (R. 40; 122). At trial the four photographs seized from Mr. Osborne's album were admitted into evidence over his objection. (R. 68-73). Mr. Osborne moved for a judgment of acquittal on the grounds that the state had failed to prove that the photographs depicted an actual person who was a minor. (R. 112-115). The trial court overruled this motion and submitted the case to the jury. The jury returned a guilty verdict. (R. 125). The trial court sentenced Mr. Osborne to the maximum possible jail term--six months. (R. 130).

a guilty verdict. (R. 125). The trial court sentenced Mr. Osborne to the maximum possible jail term--six months. (R. 130).

Mr. Osborne appealed his conviction to the Tenth District Court of Appeals where he again challenged (1) the constitutionality of O.R.C. 2907.323(A)(3) on the basis of vagueness, overbreadth, and violation of rights of speech and privacy; (2) the validity of the search warrant; and (3) the use of the unauthenticated photographs, which were the basis of the prosecution, to prove the age of the photographic subject. The Tenth District Court of Appeals affirmed Mr. Osborne's conviction.

Mr. Osborne appealed to the Ohio Supreme Court, where he raised the issues that he had raised in the Court of Appeals. The Ohio Supreme Court construed O.R.C. 2907.323(A)(3) in an attempt to meet constitutional standards. It rewrote the statute to include an element of scienter, to define the age of minority, and to limit the regulated materials to depictions of minors in which the nudity "constitutes a lewd exhibition or involves a graphic focus on the genitals," and construed the proper purposes for which such materials may be possessed as "morally innocent." It ruled that no evidence of minority, other than the photographs which were the basis of the prosecution, need be offered to meet the state's burden of proof. The Ohio Supreme Court affirmed Mr. Osborne's conviction and subsequently denied his motion for re-hearing.

Mr. Osborne now timely appeals to this Court. The Ohio Supreme Court has granted him an appeal bond pending the outcome of this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. VAGUENESS, OVERBREADTH, AND THE FIRST AMENDMENT

(a) Overbreadth. Ohio Revised Code 2907.323(A)(3) says that no person shall "possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity" unless for a "proper purpose" or with the permission of the child's legal guardian. This statute is titled "Illegal use of a minor in nudity-oriented material." It was enacted with the recognition that materials depicting nude minors are not necessarily obscene or pornographic and that they are not necessarily harmful to the children appearing therein. This is clear from the fact that the materials themselves are not made illegal but rather that the classes of people who may possess or view them are limited. Nudity is defined in O.R.C. 2907.01(H) as

> the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

This statutory definition of nudity describes exactly the nature of the materials addressed by O.R.C. 2907.323(A)(3). The legislative intent was to address all materials and performances involving child nudity. Obscene and sexually oriented materials were covered by other statutes. The fact that this was the legislative intent is demonstrated by the list of exceptions to criminal liability in O.R.C. 2907.323(A)(3)(a).

O.R.C. 2907.323(A)(3) limits the dissemination of materials featuring nude minors to those who would possess or view them for

"proper purposes." Had the General Assembly intended to limit the matters addressed to child pornography, there would have been no logic in creating exceptions for parents, guardians, artists, scientists, or doctors. While any of these persons might have a legitimate interest in having a photograph of a naked child, they could not claim a legitimate interest in a pornographic photograph of a child.

Appellant challenged the constitutionality of O.R.C. 2907.323(A)(3) as overbroad, because it punished possession or viewing of First Amendment-protected materials. The Ohio Supreme Court, addressing this challenge, applied the wrong test for overbreadth. It found that O.R.C. 2907.323(A)(3) prohibits "conduct rather than pure speech." (at p. 251) It thus concluded that the overbreadth, to be unconstitutional, must be substantial. (at p. 251). The only "conduct" prohibited by O.R.C. 2907.323(A)(3) is "possession" or "viewing." Viewing a photograph is the same as reading a book. Possessing a photograph in order to view it is an integral part of viewing it. Thus, O.R.C. 2907.323(A)(3) punishes pure speech. In this context, "a constitutional distinction between speech and conduct is specious." Commonwealth v. Oakes, 401 Mass. 602, 518 N.E.2d 836, 837 (1988).

Applying this erroneous standard, the Ohio Supreme Court said (at 251) that O.R.C. 2907.323(A)(3) is not overbroad since the "proper purposes," which it found to be affirmative defenses, narrow its scope. Even under the Court's erroneous "conduct" analysis, however, the "proper purposes" do not narrow the scope of O.R.C. 2907.323(A)(3). The "proper purposes" do not relate to any of the words used to define the offense. Understanding these defenses does not aid in understanding the acts prohibited.

(b) Privacy. O.R.C. 2907.323(A)(3) encompasses private possession or viewing. This Court held in Stanley v. Georgia, 394 U.S. 557, 559 (1969), that "the mere private possession of obscene matter cannot constitutionally be made a crime." Under O.R.C. 2907.323(A)(3), the material possessed need not be obscene. Thus, there is even less basis for infringing the possessor's privacy right than where the material is constitutionally unprotected. "If the First Amendment means anything," this Court said in Stanley, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. 565.

The statute upheld by this Court in New York v. Ferber, 458 U.S. 747 (1982), prohibited production, sale, or advertising. It did not prohibit possession or viewing. Thus, in Ferber, this Court did not address the issue of private possession or viewing.

(c) Lack of Scienter. O.R.C. 2907.323(A)(3) is overbroad for the additional reason that it lacks a requirement of scienter. "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material." Mishkin v. New York, 383 U.S. 502, 511 (1966). The trial judge in the case at bar, however, did not instruct the jury that it need find any culpable mental state. He said that this was a strict liability offense. The Ohio Supreme Court construed the statute to require proof of "notice" to the accused of the character of the depiction, which, it said, amounted to a mental state of recklessness. (at p. 253).

A "recklessness" standard, however, is insufficient to avoid the hazard of self-censorship. Scienter protects against self-censorship because the individual knows that the material is of a certain type. "Recklessness" in Ohio requires only that there be a "known risk" that circumstances "are likely to exist." (at p.

253). It does not require that the accused know that the material is of a certain type. It requires only that the accused be aware of a risk that the material might be of a certain type. This puts the individual into precisely the situation of self-censorship that this Court said in Mishkin must be avoided. This Court has said that "knowledge of the content of the materials" is required. Hamling v. United States, 418 U.S. 87, 123 (1974).

(d) Possession or Viewing. This Court in Ferber v. New York, 458 U.S. 747 (1982), upheld against a First Amendment challenge a statute prohibiting production, sale, or advertising. O.R.C. 2907.323(A)(3) prohibits possession and viewing. Thus, O.R.C. 2907.323(A)(3) is broader than the statute upheld in Ferber. This Court's rationale in Ferber was that distribution was an integrally related to sexual abuse of children. 458 U.S. 759. Possession and viewing are not nearly so related to the production of the items in question. The use in O.R.C. 2907.323(A)(3) of the word "view" is particularly overbroad. That term is not defined in Ohio statutory or case law. If a depiction prohibited by O.R.C. 2907.323(A)(3) were on a billboard, each passerby would "view" it. O.R.C. 2907.323(A)(3) does not specify that a person must "view" for longer than a fleeting second. It does not specify that the person intend to "view." O.R.C. 2907.323(A)(3) does not limit its scope to children located in Ohio at the time the photographs are produced. Those are the only children in which Ohio has a legitimate interest. O.R.C. 2907.323(A)(3) does not require that the child depicted be alive at the time of possession or viewing by the accused.

Despite its conclusion that O.R.C. 2907.323(A)(3) is not overbroad as regards its prohibition against depictions of nudity, the Ohio Supreme Court attempted a narrowing construction

of the term "nudity." It said that O.R.C. 2907.323(A)(3) applies only where the "nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." (at 252). In New York v. Ferber, 458 U.S. 747, 765 (1982), this Court said that a state might constitutionally proscribe a depiction of "lewd exhibition of the genitals." The Ohio Supreme Court does not limit "lewd exhibition" to the genitals but construes O.R.C. 2907.323(A)(3) to prohibit a "lewd exhibition" generally. The Ohio Supreme Court's only apparent definition of "lewd exhibition" is that it is "conduct which is not morally innocent, i.e., the possession or viewing of the described material for prurient purposes." (at 252)(Emphasis in original.) The Ohio Supreme Court did not make it clear how "moral innocence" served to limit "nudity."

"Graphic focus on the genitals" also fails to limit "nudity." "Graphic focus on the genitals" is a phrasing original with the Ohio Supreme Court. It goes beyond the kind of depiction that this Court said in Ferber, id., could constitutionally be prohibited. "Graphic focus on the genitals" does not limit "nudity" in any ascertainable way. "Graphic" is not defined by Ohio statutory or case law. "Graphic" is a word that refers to a writing that is so vivid that it provides an impression similar to that of a picture. "Graphic" cannot be used to refer to a visual depiction or performance. Moreover, as an adjective modifying "focus," "graphic" makes no sense. Webster's Third New International Dictionary (unabr. 1986). Possibly the Ohio Supreme Court means by "graphic" to emphasize "focus" in some way, but in just what way is not clear. "Focus" too is unclear in this context. Possibly the Ohio Supreme Court means something narrower than any depiction of a nude person in which the genitals are visible. "Focus" on the genitals could mean that genitals are at the center of the depiction, or that the depiction is done in

such a way as to direct the viewer's eye to the genitals. It could simply refer to the viewer's perspective. It is not clear that the phrase "graphic focus on the genitals" imposes any limitation on the term "nudity."

The Ohio General Assembly enacted other statutes to prohibit the possession of child pornography and obscenity. O.R.C. 2907.321(A)(5) punishes the possession of "any obscene material, that has a minor as one of its participants." O.R.C. 2907.322 criminalizes the possession of "any material that shows a minor participating or engaging in sexual activity, masturbation or bestiality" (upheld by the Ohio Supreme Court in State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697, cert. den. 480 U.S. __, 107 S.Ct. 1581, 94 L.Ed.2d 771 (1987). The legislative intent behind O.R.C. 2907.323(A)(3) was to limit dissemination of depictions of child nudity. It was not to regulate the content of such materials. The Ohio Supreme Court's construction has altered the function of O.R.C. 2907.323(A)(3) so that it no longer reflects the legislative intent.

A court may limit an overbroad statute. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). But to do so, a court may not take such liberties as to distort a statute's original meaning. As the New Hampshire Supreme Court said in a decision affirmed by this Court, "'words, provisions, or modifications' may not at all events be read into a law to the end that it may be clothed with constitutional validity." State v. Cox, 16 A.2d 508, 513 (1940), affirmed as Cox v. New Hampshire, 312 U.S. 569 (1941). The New Hampshire Supreme Court there cited a previous decision in which it said that the doctrine of giving a limiting construction to preserve constitutionality "affords no warrant for giving the statute a meaning that the legislature did not intend." State v. Gerry, 38 A. 272, 276 (1896).

The Massachusetts Supreme Judicial Court was confronted with a statute that prohibited production of depictions of child nudity. It decided, like the Ohio Supreme Court, that a prohibition relating to depictions of child nudity was overbroad. But the Massachusetts court held the statute unconstitutional. Commonwealth v. Oakes, 401 Mass. 602, 518 N.E.2d 836, 838 (1988). That is the proper approach. A statute prohibiting distribution of depictions of child nudity is so clearly overbroad that it cannot be rendered constitutional by construing it to prohibit "lewd exhibition," which is quite different from the purpose of O.R.C. 2907.323(A)(3).

(e) Proper Purposes. The proper purposes for which materials or performances depicting child nudity may be possessed or viewed are, according to O.R.C. 2907.323(A)(3):

> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

The Ohio Supreme Court failed to say what religious, artistic, educational, medical, scientific, governmental, or judicial purposes are "bona fide" or how that determination is to be made. It failed to note how other purposes will be assessed for propriety. It did not define proper interests.

The Ohio Supreme Court held that the function of the proper purposes exception "is to sanction the possession or viewing of

material depicting nude minors where that conduct is morally innocent." Few would anticipate that their religious or artistic purpose was not "bona fide" and therefore not morally innocent.

The materials and performances addressed by O.R.C. 2907.323(A)(3), according to the construction by the Ohio Supreme Court, must depict nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals." (at 252). Neither the Ohio Supreme Court nor O.R.C. 2907.323(A)(3) provides any guideline for determining when the possession of such material is "morally innocent." The phrase "moral innocence" is so fraught with vagueness that no person can guess at its meaning. Every person accused under O.R.C. 2907.323(A)(3) will be subject to the judge's or jurors' assessment of the morality of his purpose in possessing or viewing the regulated materials. The absence of moral innocence cannot be the basis for determining legal guilt.

(f) Age of Minority. O.R.C. 2907.323(A)(3) prohibits the possession or viewing of materials or performances featuring nude minors. It fails to define the age of minority. The Ohio Supreme court construed "minor" to mean " a person under eighteen years of age." (at p. 249). As a result, O.R.C. 2907.323(A)(3) now punishes those who possess or view non-obscene materials or performances which depict legal acts. In Ohio, the age of consent for sexual conduct is fifteen years. O.R.C. 2907.04. Under the Ohio Supreme Court's construction, a person is punishable for possessing or viewing materials or performances depicting legal acts. The Court created the untenable situation in which it is legal to engage in sexual activity with a fifteen-year-old but criminal to retain a photograph of the activity.

If a "statute uses words of no determinative meaning," this Court said in Winters v. New York, 333 U.S. 507, 516 (1948), but

encompasses acts "which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." A criminal statute is unconstitutionally vague if it is so indefinite "that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The constitutional infirmities of vague penal statutes are threefold. They fail to provide fair notice to the accused. United States v. Harris, 347 U.S. 612, 627 (1954). They fail to set clear guidelines for those charged with their administration, resulting in arbitrary enforcement. Smith v. Goguen, 415 U.S. 556, 572-73 (1974). They often proscribe conduct that is innocent. Papachristou v. Jacksonville, 405 U.S. 156, 163 (1972). The standard for vagueness is particularly strict where First Amendment rights are involved, Smith v. California, 361 U.S. 147, 151 (1959), because of the chilling effect of a vague statute on those rights.

This Court has recognized that one person's art may be another's obscenity, and one person's religion may be another's heresy. It is impossible to determine under what circumstances any person may legally possess or view the materials described in O.R.C. 2907.323(A)(3).

The Ohio Supreme Court attempted to construe O.R.C. 2907.323(A)(3) to cure its vagueness. It failed in this effort. Like the New York Court of Appeals in Winters v. New York, it tried to limit a vague statute, but its words of limitation are themselves vague. Thus, the limiting construction "is not an effective notice of new crime." Winters v. New York, 333 U.S. 507, 519 (1948).

II. RETROACTIVE APPLICATION

Appellant was convicted under a statute that (a) prohibited possession or viewing of depictions of nude minors, (b) did not designate the age of minority, and (c) contained no element of scienter.

(a) Nudity. Appellant was convicted at trial on the basis of proof of possession of photographs that depicted a person found by the trial court to be a minor. The character required by the statute and by the trial court of the nature of the photographs was that they depict nudity. Only at the level of the state supreme court was it determined that the character of the photographs should be "lewd exhibition" or "graphic focus on the genitals." This is quite different, as indicated above, from the "nudity" required by the statute and by the trial court. The trial judge instructed the jury that "nudity" meant "the showing, representation, or depiction of human male genitals, pubic area or buttocks with less than a full opaque covering." Before trial and at trial, Appellant had no way of knowing that "lewdness" or "graphic focus" were what was prohibited.

The Ohio Supreme Court, as indicated above, attempted to narrow O.R.C. 2907.323(A)(3) by defining "nudity" to exclude "morally innocent" behavior. At the time of the alleged offense and at trial, Appellant had no way of knowing that lack of "moral innocence" was an element of the offense.

The Ohio Supreme Court said, regarding the character of the material whose possession or viewing is prohibited by O.R.C. 2907.323(A)(3), that it must constitute a "lewd exhibition," which it said meant "conduct which is not morally innocent, i.e., the possession or viewing of the described material for prurient purposes." (at 252)(Emphasis in original.) The Court thus made

prurient purpose an element of the offense. But at trial the jury was not told that prurient purpose or lack of moral innocence were elements. Appellant did not defend himself against a charge that he had a prurient purpose or lacked moral innocence because at the time of trial he did not know that these were elements of the offense.

(b) Age of Minority. The Ohio Supreme Court decided that the age of minority for purposes of O.R.C. 2907.323(A)(3) was eighteen years, that is, that what was prohibited was possession of a depiction of a person below the age of eighteen. The statute is silent as to age. The age of consent for sexual relations is fifteen years. "Corruption of a minor," an offense in the same chapter, O.R.C. 2907.04, uses the age of fifteen as the age below which sexual acts with a person are prohibited. No one reading the given chapter could conclude that eighteen would be the relevant age for liability under O.R.C. 2907.323(A)(3). Only at trial was it determined by the court, and upheld on appeal, that eighteen was the relevant age.

(c) Lack of Scienter. The trial judge did not instruct the jury that it need find any culpable mental state. The trial court treated O.R.C. 2907.323(A)(3) as a strict liability offense. The Ohio Supreme Court, on the other hand, construed it to require proof of "notice" to the accused of the character of the depiction, which, as it explained, amounted to a mental state of recklessness. Appellant, at the time of the alleged offense and at time of trial, had no idea of what mental state would subsequently be required for conviction.

(d) Law Applicable to Retroactive Construction. The act of which the Ohio Supreme Court deemed Appellant guilty differs, in these important respects, from the act of which the trial court convicted him. A person may not be convicted under a statute that

receives only on appeal in his case a "constitutionalizing" construction that differs in significant respects from the statute as written. When this occurs, the accused has not had the opportunity at trial to address what ultimately are determined to be the elements of the offense. It further denies the accused the right to have a jury determine his guilt or innocence based on the elements of the offense. U.S. Constitution, Amendment VI.

In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), this Court let stand a New Hampshire conviction under a statute prohibiting opprobrious language, only because the New Hampshire Supreme Court, had previously construed the statute to apply to fighting words only. Referring to the New Hampshire Supreme Court's rulings on the statute in question, this Court said: "On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace,..." 315 U.S. 573 (Emphasis supplied). In Gooding v. Wilson, 405 U.S. 518, 522-23 (1971), this Court cited Chaplinsky as controlling authority on that point. In Gooding, this Court said that in Chaplinsky the New Hampshire Supreme Court had limited the statute long before the words for which Chaplinsky was convicted.

This Court stated in Dombrowski v. Pfister, 380 U.S. 479, 492 (1965), that "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute." (Emphasis supplied.) A limiting construction must be provided before the accused may be charged and tried. Neither a trial nor appellate court may give a limiting construction that substantially changes the elements of the offense and apply it retroactively to the accused.

In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), this Court held that where a state supreme court construes, to render

it constitutional, a facially invalid statute regulating speech activity, the conviction in the instant case must be overturned. The statute in that case permitted local authorities to refuse a parade permit with little limitation on their discretion. The state supreme court construed the statute to require more definite criteria. This Court said that though the statute as construed by the state supreme court was constitutionally valid, the conviction in that case had to be overturned, since the accused could not have known at the time of trial what the state supreme court would ultimately find the statute to mean. "It would have taken extraoddinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." 394 U.S. 156. Appellant in the case at bar is in the same situation as Shuttlesworth.

III. EVIDENCE OF MINORITY

One element of the offense described in O.R.C. 2907.323(A)(3) is that the photographs or performances viewed or possessed involve minors. At the time of Appellant's trial, minority had not been defined although the age of consent in Ohio (for sexual relations) is fifteen years. The Ohio Supreme Court construed "minor" in its opinion in this case to mean a person under eighteen years of age for purposes of O.R.C. 2907.323(A)(3). (at 252).

At trial the state offered into evidence to prove the age of the person depicted four photographs marked State's Exhibits 1A, 1B, 1C, and 1D. (R. 68). Appellant asked that these photographs be excluded from evidence, in a motion in limine (R. 14-17) that was overruled. (R. 68-73). No foundation was laid to establish that the photographs were true and accurate depictions of the subject matter. No other evidence was offered to identify the person depicted or to establish that person's age at the time the photographs were taken. No evidence was offered to establish that the subject matter depicted was a real person rather than an invention of technological manipulation. Despite the failure to lay a proper foundation for admissibility, the photographs were admitted over Appellant's objection. (R. 73).

The Ohio Supreme Court ruled that the photographs that were the basis of the prosecution were relevant and therefore admissible, without any authentication to prove that they accurately portrayed the subject matter depicted. (at 258). The Ohio Supreme Court held that these unauthenticated photographs could be used as the only proof of the photographic subject's age. (at 258). The Ohio Supreme Court did not even require proof that the subject matter was a depiction of a real person.

Unauthenticated photographs are not admissible in any other type of criminal case or evidentiary proceeding in Ohio. Cincinnati, Hamilton and Dayton Ry. Co. v. DeOnzo, 87 Ohio St. 109 (1912), State v. Hannah, 54 Ohio St. 2d 84, 88 (1978).

Other states in prosecuting child pornography cases have required proof of the photographic subject's age. One commentator noted:

> Where the age of the child cannot be proven through the child's testimony, this element of the offense has been proven with circumstantial evidence, usually expert testimony, preferably by a pediatric endocrinologist. The expert can visually examine the photographs and identify the child's age based on five distinct states of adolescent pubertal development. The effectiveness of this testimony depends on the clarity, lighting, and angle of the photograph. Note, Child Protection Act of 1984 - Enforceable Legislation to Prevent Sexual Abuse of Children, 10 Okla. City U. L. Rev. 121, 135 (1985).

The Ohio Supreme Court, by failing to require authentication, has permitted conviction on the basis of proof less than proof beyond a reasonable doubt. The state must establish every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). The Ohio Supreme Court has effectively created a presumption that any photographic subject who appears to be a minor is a minor for purposes of prosecution under O.R.C. 2907.323(A)(3) and has placed the burden on the accused to show that the photographic subject is over the age of eighteen. This Court, in Sandstrom v. Montana, 442 U.S. 510, 524 (1979), rejected a jury instruction that could have been understood as shifting the burden of persuasion on the element of intent. A state may not shift to the accused the burden of proving an element of a crime charged. Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Ohio Supreme Court ruled that "the relevance of the photographs [admitted in this case] is not dependent on whether they accurately depict the subject matter portrayed, but

on...whether they are the sort of material outlawed by R.C. 2907.323(A)(3)." (at 258). The type of material outlawed by O.R.C. 2907.323(A)(3) is that which depicts minors. The Ohio Supreme Court further held that the minority of the person depicted was established in the case at bar because

> The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen...and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As possession of these photographs alone would support appellant's conviction we need not consider whether the state proved the minority of the subject in the sole remaining photograph. (at 258)(Emphasis supplied).

The purpose of O.R.C. 2907.323(A)(3) is to protect minors. The fact that a model in a photograph may appear to be a minor is no proof of minority. It is the state's burden to prove minority. A presumption based upon appearance does not meet this burden, nor does it serve the statute's purpose of protecting minors.

IV. SEARCH WARRANT

The photographs introduced in evidence against Appellant were seized by Columbus police during a search of his home. The search was conducted pursuant to a warrant whose affiant was Detective James Phillips of the Columbus Division of Police. That warrant was defective in two respects. U. S. Constitution, Amendment VI.

First, the warrant was based on triple hearsay. Detective Phillips recited that all the information contained in his affidavit came from a U.S. postal inspector in Cleveland, Ohio, named Paul M. Hartman. According to Phillips, Hartman received his information from a U.S. postal inspector in Florida, named Daniel Witouski. Phillips affirmed that Hartman told him that Witouski had told Hartman that two persons under arrest in Florida (Jack S. Smith and Daniel S. Knous) had told him that certain photographs were in possession of Appellant. The warrant did not recite facts to indicate that either informant might be credible.

Second, the statements of Smith and Knous did not reliably indicate that the photographs would be in Appellant's home. The statement of Smith regarding photographs was "they're with a friend of mine in Ohio named Clyde." The statement of Knous was that they were in possession of Clyde Osborne. Neither informant indicated that the material would be in Appellant's home. Neither indicated any basis for knowing that the material was presently in Appellant's possession, as opposed to knowing that he had had it at some time in the past. Aguilar v. Texas, 378 U.S. 108 (1964); McCray v. Illinois, 386 U.S. 300 (1967).

CONCLUSION

O.R.C. 2907.323(A)(3) is, to counsel's knowledge, the broadest statute in any United States jurisdiction containing prohibitions relating to depictions of child nudity. O.R.C. 2907.323(A)(3) omits any scienter standard, does not specify age of minority, and does not specify sexual conduct. The Illinois statute at issue in Geever v. Illinois, 112 Ill.2d 313 (1988), dismissed for want of jurisdiction, __ U.S. __ (October 31, 1988), did not prohibit mere "viewing," did specify the age of minority, did require knowledge of the character of what was depicted, and did specify prohibited sexual acts beyond mere nudity. The Ohio Supreme Court's effort in its decision below to construe O.R.C. 2907.323(A)(3) to render it constitutional involved a substantial re-writing that violated the statute's purpose and did not solve its vagueness or overbreadth.

Even if this Court should find the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3) to render it constitutionally valid, that construction may not constitutionally be applied to Appellant.

The Ohio Supreme Court required no authentication of the photographs that served as the basis for the prosecution, or introduction of any other evidence, to prove the age of the person depicted. It thereby violated constitutional requirements regarding proof of elements of offenses.

Finally, the Ohio Supreme Court refused to find error in introduction of photographs seized pursuant to a defective warrant.

For these four reasons, Appellant asks this Court to find that the questions presented are substantial and to give plenary consideration to his appeal.

Respectfully submitted,

S. ADELE SHANK
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394
Counsel of Record

John Quigley
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

David Goldberger
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Jurisdictional Statement was served upon the offices of Ronald J. O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and on Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, by regular U.S. mail on this 10th day of November, 1988.

S. Adele Shank

S. ADELE SHANK
Counsel for Appellant

88-5983

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellant, Clyde Osborne, through counsel, respectfully requests leave to file his appeal from the Supreme Court of Ohio without prepayment of costs or fees and to proceed in forma pauperis, pursuant to Rule 46.

Appellant was found to be indigent by the Municipal Court of Franklin County, Ohio, which permitted him to proceed in forma pauperis, represented by the Public Defender of Franklin County, Ohio. On appeal, Appellant has been represented at no cost by the Clinical Program of the College of Law, Ohio State University.

RECEIVED
NOV 14 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Appellant's affidavit in support of this motion is attached hereto.

Respectfully submitted,

S. ADELE SHANK
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion for Leave to Proceed in Forna Pauperis was forwarded by ordinary U.S. Mail to Ronald O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, this 14th day of November, 1988. I further certify that all parties required to be served have been served.

S. ADELE SHANK
Assistant State Public Defender

COUNSEL FOR APPELLANT

88-5996

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Clyde Osborne, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes - Part Time

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Social Security $250.00 Mo. Title V Program
~~$268.00 Mo Senior Community Svc~~ Employment Program
(Before Taxes) 1393 East Broad St. Suite 104
Columbus Ohio 43205.
Assigned Godman Guild 2nd Ave
Senior Dimension Center Litecam

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Social Security As Mentioned Above.

3. Do you own any cash or checking or savings account?

Yes

a. If the answer is yes, state the total value of the items owned. $75.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1981 Sabaru - $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

_____

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clyde Osborne.
CLYDE OSBORNE

SUBSCRIBED AND SWORN To before me this 18th day of November, 1988.

Mary Carol Peirano
NOTARY

My Commission expires: MARY CAROL PEIRANO
Notary Public
My Commission Expires Dec. 30, 1992

IN THE SUPREME COURT OF OHIO

Clyde Osborne,	:	
Appellant,	:	
v.	:	Case No. 86-1728
State of Ohio,	:	
Appellee.	:	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Clyde Osborne hereby serves notice that he appeals to the Supreme Court of the United States, under 28 U.S.C. § 1257(2), from the decision of this Court of August 31, 1988, in which it denied his motion to re-hear its Judgment of July 6, 1988, and from said Judgment, which affirmed his conviction.

Respectfully submitted,

S. Adele Shank
Assistant State Public Defender
Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

John Quigley
The Ohio State University
College of Law
Clinical Programs
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821

FILED
NOV 10 1988
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

OF COUNSEL:

David Goldberger
The Ohio State University
College of Law
Clinical Programs
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Notice of Appeal was served upon the offices of Ronald J. O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and of Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, by regular U.S. Mail on this 10th day of November, 1988.

S. ADELE SHANK - 0022148

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: October 12, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	E N T R Y
Clyde Osborne, Appellant.	:	(Franklin County)

UPON CONSIDERATION of the motion filed by counsel for appellant to withdraw this Court's mandate to the Court of Appeals, or, to stay execution of the mandate, pending the appellant's appeal to The United States Supreme Court,

IT IS ORDERED that the motion for withdrawal of mandate be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that execution of the mandate and sentence be, and the same are hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: August 31, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	REHEARING ENTRY
Clyde Osborne, Appellant.	:	(Franklin County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 31st day of August, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: July 6, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	JUDGMENT ENTRY
Clyde Osborne, Appellant.	:	CERTIFIED BY THE COURT OF APPEALS

This cause, here on certification by the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Appeals for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 85AP945)

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 6th day of July, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

THE STATE OF OHIO, APPELLEE, v. YOUNG, APPELLANT.

THE STATE OF OHIO, APPELLEE, v. OSBORNE, APPELLANT.

[Cite as State v. Young (1988), 37 Ohio St. 3d 249.]

Criminal law—Prohibition of possession or viewing of material or performance of minor in state of nudity—R.C. 2907.323(A)(3) is constitutional—"Minor," construed—Culpable mental state of recklessness required—"Proper purposes" exceptions are affirmative defenses.

0.3ur 3d Criminal Law §§ 1860, 1877.6

1. R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.
2. The term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.
3. Recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3).
4. The "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2).

(Nos. 86-1532 and 86-1728—Submitted May 3, 1988—Decided July 6, 1988.)

CERTIFIED by the Court of Appeals for Franklin County, Nos. 85AP-1033 and 85AP-945.

In case No. 86-1532, Columbus police officers applied for a warrant to search the residence of defendant-appellant, Denis Young. The facts contained in the affidavit for the warrant were provided to police by two male minors who had been arrested on separate occasions for being a runaway and for male prostitution, respectively. Both informants reported that they had been picked up by Young and taken to Young's home, that Young had taken nude photographs of them, and that they had engaged in sexual acts with Young. Further, both informants reported that they had observed photographs in Young's house of nude minors or of minors engaged in sexual activity.

The warrant was executed on March 21, 1985. Various items were seized, including four photographs of one of the informants. Young was subsequently charged with possession of material depicting a minor in a state of nudity in violation of R.C. 2907.323 (A)(3).

Young filed a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional. He also moved to suppress the evidence seized pursuant to the search, alleging that the search warrant was issued without probable cause. Both motions were overruled, the motion to suppress after a hearing. Young thereafter entered a plea of no contest and was found guilty of the charge set forth in the indictment. Upon appeal, the court of appeals affirmed Young's conviction, upholding the constitutionality of R.C. 2907.323(A)(3).

In case No. 86-1728, Columbus police secured a warrant to search the residence of defendant-appellant, Clyde J. Osborne. The warrant was issued pursuant to an affidavit sworn by Detective James A. Phillips of the Columbus Police Department. The information recited in the affidavit was based on a conversation between Phillips and an Ohio postal inspector. The inspector informed Phillips that a Florida postal inspector had arrested two persons in that state who, during interrogation, implicated Osborne as having photographic negatives of child pornography in his possession.

The warrant was executed on July 22, 1985, resulting in the seizure of, *inter alia*, photographs of nude male minors. Osborne was subsequently charged with a violation of R.C. 2907.323(A)(3).

Osborne filed various pretrial motions, including a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional, and a motion to suppress the evidence seized during the search. These motions were overruled and, after a jury trial, appellant was found guilty as charged.

Upon appeal, the court of appeals upheld the constitutionality of R.C. 2907.323(A)(3) and affirmed Osborne's conviction.

By separate entries, the appellate court, finding its judgments in case Nos. 86-1532 and 86-1728 to be in conflict with the judgment of the Court of Appeals for Hamilton County in *State* v. *Meadows* (Dec. 18, 1985), No. C-850091, unreported, certified the record of each case to this court for review and final determination.

Ronald J. O'Brien, city attorney, for appellee.

Andrea R. Yagoda, for appellant in case No. 86-1532.

Richard Cartner, for appellant in case No. 86-1728.

S. Adele Shank, for appellants.

DOUGLAS, J. The question certified to this court in the two cases before us today is whether the state, consistent with the First Amendment to the United States Constitution, may outlaw the private possession of child pornography. This question has since been answered in the affirmative in *State* v. *Meadows* (1986), 28 Ohio St. 3d 43, 28 OBR 146, 503 N.E. 2d 697. The syllabus in *Meadows* reads:

"R.C. 2907.322(A)(5), which prohibits the knowing possession or control of material which shows a minor participating or engaging in sexual activity, masturbation, or bestiality, does not violate the First Amendment to the United States Constitution, as made applicable to the states by reason of the Fourteenth Amendment. (*Stanley* v. *Georgia* [1969], 394 U.S. 557, and *New York* v. *Ferber* [1982], 458 U.S. 747, construed, harmonized and followed.)"

Our ruling in *Meadows* concerned the constitutionality of R.C. 2907.322(A)(5), while the cases before us today involve a related statute, R.C. 2907.323(A)(3). However, shortly after *Meadows* was decided, this court issued judgment entries in two cases involving R.C. 2907.323(A)(3), both of which were resolved solely on the authority of *Meadows*. *State* v. *Modern* (1986), 28 Ohio St. 3d 64, 28 OBR 164, 502 N.E. 2d 634; *State* v. *Robinson* (1986), 28 Ohio St. 3d 65, 28 OBR 165, 502 N.E. 2d 634. Thus, the question certified to this court in today's cases has already been decided.

However, it is well-established that "[c]ertification of the record of a case to the Supreme Court because of conflict between judgments of Courts of Appeals upon any question, brings the entire case before the Supreme Court for review." *Cook* v. *Ocean Acc. & Guar. Corp.* (1941), 138 Ohio St. 110, 20 O.O. 65, 33 N.E. 2d 9, paragraph one of the syllabus. On this basis, we turn now to a consideration of the remaining issues presented by the cases at bar.

In addition to the First Amendment issues resolved in *Meadows*, *supra*, appellants herein raise additional challenges to the constitutionality of R.C. 2907.323(A)(3) which were not addressed in that decision. In determining the validity of these challenges, we must remain mindful that all legislative enactments enjoy a strong presumption of constitutionality. *State, ex rel. Dunkman*, v. *Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus.

Appellants first argue that R.C. 2907.323(A)(3) violates the constitutional prohibition against vagueness and overbreadth. The statute provides in pertinent part:

"(A) No person shall do any of the following:

"* * *

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Appellants contend that the statute is overbroad because it sweeps within its ambit other activities that constitute an exercise of constitutionally protected expression. For example, the use of the term "nudity" is challenged as overly broad, since that term encompasses morally innocent states of nudity as well as lewd exhibitions. Thus, it is argued, the statute fails to define in a sufficiently narrow manner the criminal conduct it prohibits. See, *e.g.*, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415.

We do not agree with this analysis. The First Amendment doctrine of overbreadth is limited in its application to laws in which the deterrence of protected activities is substantial. Where, as here, a statute regulates conduct rather than pure speech, its overbreadth "* * * must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 615. For the following reasons, we find that R.C. 2907.323(A)(3) is not constitutionally infirm on the basis of overbreadth.

It is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that "* * * nudity, without more is protected expression * * *," even where the subject depicted is a child. *New York* v. *Ferber* (1982), 458 U.S. 747, 765, fn. 18. However, when the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct nar-

rows significantly. The clear purpose of these exceptions, quoted *supra*, is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.

In the area of child pornography, the United States Supreme Court has directed that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or *authoritatively construed*." (Emphasis added.) *Ferber*, *supra*, at 764. As we construe it today, R.C. 2907.323 (A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.

Appellants further argue that R.C. 2907.323(A)(3) is impermissibly vague in that the term "minor" is not defined with sufficient precision. Appellants contend that in using only the term "minor" without elaboration, the statute fails to limit its proscription to "* * * works that *visually* depict sexual conduct by children below a specified age" (emphasis sic) as mandated by *Ferber*, *Id.* at 764. We cannot agree.

A criminal statute is impermissibly vague only where it is so imprecise and indefinite that persons of ordinary intelligence "* * * must necessarily guess at its meaning and differ as to its application." *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 54 O.O. 2d 162, 266 N.E. 2d 571, syllabus. See, also, *Connally* v. *General Constr. Co.* (1926), 269 U.S. 385, 391. While R.C. Chapter 2907 does not define the word "minor," this omission is not fatal. Any term which is not defined by a statute is accorded its common, ordinary meaning. *State* v. *Dorso* (1983), 4 Ohio St. 3d 60, 62, 4 OBR 150, 152, 446 N.E. 2d 449, 451. We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

Appellants next argue that R.C. 2907.323(A)(3) lacks a requirement of scienter and is therefore unconstitutional. Appellants rely on the statement of the *Ferber* court at 765 that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

Our review of R.C. 2907.323(A)(3) reveals that no particular degree of scienter is specified. The statute differs in this respect from R.C. 2907.321 and 2907.322, which both require "knowledge of the character of the material or performance involved * * *." However, the omission of this element from the delineation of the offense does not render the statute fatally flawed. R.C. 2901.21(B) provides:

"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense.

When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." (Emphasis added.)

As noted above, R.C. 2907.323(A)(3) does not specify any degree of culpability. Nor does it "* * * plainly indicat[e] a purpose to impose strict liability * * *." Therefore, pursuant to R.C. 2901.21(B), the degree of culpability required to commit the offense is recklessness. *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State* v. *O'Brien* (1987), 30 Ohio St. 3d 122, 124, 30 OBR 436, 437, 508 N.E. 2d 144, 146.

The term "recklessness" is defined in R.C. 2901.22(C):

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

This standard of recklessness is sufficient, in our view, to satisfy the requirement in *Ferber* of "some element of scienter." *Id.* at 765. Scienter is the equivalent of guilty knowledge. *State* v. *Jacobellis* (1962), 173 Ohio St. 22, 18 O.O. 2d 207, 179 N.E. 2d 777, paragraph two of the syllabus, reversed on other grounds (1964), 378 U.S. 184. In *Jacobellis*, this court construed the term "knowingly possess," as used in R.C. 2905.34 (since repealed), as including *both* scienter (guilty knowledge) *and* "mens rea" (guilty purpose). *Id.* Thus, scienter may be a lesser standard than that contained in the term "knowingly." We cannot require the state to prove that the defendant possessed the material in question "knowingly," because innocent motive or purpose is irrelevant to the existence of knowledge as defined in R.C. 2901.22(B). *State* v. *Wenger* (1979), 58 Ohio St. 2d 336, 339, 12 O.O. 3d 309, 311, 390 N.E. 2d 801, 803, fn. 3. By contrast, a motive or purpose may be highly significant to a determination of whether a defendant has violated R.C. 2907.323(A)(3). For example, the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) excuse possession of otherwise outlawed material where the motive or purpose is innocent. Therefore, the degree of culpability required by R.C. 2907.323 (A)(3) is something less than "knowing" possession.

We note that R.C. 2901.22, which defines the various levels of culpability, ranks "recklessly" just below "knowingly" in degree. R.C. 2901.22(E). The definition of recklessness in R.C. 2901.22(C) speaks of a perverse disregard for a *known* risk. Thus, "some element of scienter" is involved, which is all that *Ferber* requires. Accordingly, we find that recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3). Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties. The inclusion of the proper purposes exceptions demonstrates that criminal liability attaches only where possession can have no legitimate purpose.

The state may prove the required notice by demonstrating, for example, the defendant's attempts to conceal the material or to disguise his ownership, his possession of a massive amount of such material, or the ob-

viousness of the character of the material. *Mishkin* v. *New York* (1966), 383 U.S. 502, 511. The state need not prove that the accused was aware of the *actual content* of the material, but only that he was on notice as to its nature or character. See *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 363-364, 10 O.O. 3d 485, 490-491, 384 N.E. 2d 255, 262.

Appellant Osborne contends that the trial court erred in overruling his motion for acquittal since the essential element of scienter was not proven at trial. However, our review of the record reveals that appellant never objected to the omission of this element from the charge to the jury. Appellant's own proposed jury instructions were completely silent on the element of scienter. Where a party complaining of error could have called, but did not call, the error to the trial court's attention at a timely juncture, the error is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, paragraph one of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911. In such a case, the alleged error may warrant reversal only if it rose to the level of plain error and prejudiced appellant. *State* v. *Adams*, *supra*, at 153, 16 O.O. 3d at 170, 404 N.E. 2d at 146.

In concluding that the omission of the element of recklessness herein does not constitute plain error, we find support in *Adams*, *supra*. There, the essential element of recklessness was also omitted from the jury charge without a defense objection. This court held that this omission did not *per se* constitute plain error. *Id.* at paragraph two of the syllabus. A case-by-case approach was adopted, in which the record of the case is reviewed to determine whether a manifest miscarriage of justice will result if the conviction is permitted to stand. *Id.* at paragraph three of the syllabus. Our review of the record reveals that appellant himself testified that he gathered the photographs that were the basis of the charge and mounted them in an album, that he had last looked at the album about six months before, and that he had been told that the subject of the photographs was fourteen years old. The photographs themselves depict a nude boy, obviously a minor, in various lewd poses. Given this state of the record, we have no difficulty finding that the jury would have believed, beyond a reasonable doubt, that appellant was aware of the nature of the photographs in his possession. Accordingly, appellant would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand. *State* v. *Underwood* (1983), 3 Ohio St. 3d 12, 3 OBR 360, 444 N.E. 2d 1332, syllabus.

Appellant Young contends that the indictment in his case is fatally defective, in that no mention is made therein of any element of scienter. The indictment in question states in pertinent part that Young "did possess material that shows a minor * * * in a state of nudity * * * in violation of O.R.C. § 2907.323(A)(3) * * *." In rejecting appellant's contention, we note that appellant pleaded no contest to the charge in the indictment. A plea of no contest "* * * is an admission of the truth of the facts alleged in the indictment * * *." Crim. R. 11(B)(2). By conceding the truth of the facts set forth in the indictment, appellant admitted that the material that formed the basis for the charge was in his possession. In order to admit that the material described in the indictment was in his possession, appellant necessarily admitted his awareness of the possession, and of the nature, of the material described. Our review of the

record reveals that the photographs in question[1] obviously depict a minor in a state of nudity, which in at least one instance constitutes a graphic focus on the genitals. Appellant's conviction must stand.

Appellants next argue that R.C. 2907.323(A) is unconstitutionally vague because it fails to specify whether the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are negative elements to be proven by the state, or affirmative defenses, which must be proven by the accused. However, we find that the "proper purposes" exceptions are clearly intended to be affirmative defenses.

R.C. 2901.05(C) defines an "affirmative defense" as "* * * either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Neither R.C. 2907.323(A)(3)(a) nor (b) expressly designates the exceptions contained therein as affirmative defenses. However, the exceptions clearly constitute excuses or justifications for the possession of otherwise outlawed material, as they comprise circumstances under which the possession would be legitimate. The existence or nonexistence of a proper purpose is certainly a matter "* * * peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." While proof of proper purpose may come from objective sources, the accused will know better than any other person whether a proper purpose exists, and will be in the best position to adduce relevant evidence. See *State* v. *Doran* (1983), 5 Ohio St. 3d 187, 193, 5 OBR 404, 409-410, 449 N.E. 2d 1295, 1300. Therefore, we hold that the "proper

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[1] Appellant Young contends that the court of appeals erroneously considered these photographs since they were not properly admitted into evidence. The photographs were not marked as state exhibits or formally introduced and admitted. However, we agree with the state's argument that it is not necessary to formally mark, introduce and admit items of evidence when a no contest plea is entered under Crim. R. 11 and R.C. 2937.07.

Crim. R. 11 provides in pertinent part:

"(B) Effect of guilty and no contest pleas. * * *

"* * *

"(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information or complaint * * *."

R.C. 2937.07 provides in pertinent part:

"If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make finding of guilty or not guilty from the explanation of circumstances and if guilt be found, impose or continue for sentence accordingly. * * *"

Crim. R. 11 requires that the defendant accused of a felony be informed of the effect of a plea of no contest. Crim. R. 11(C)(2). Under R.C. 2937.07, the judge may make a finding of guilty from the explanation of the circumstances. Neither provision requires a formal admission of exhibits.

Our review of the record reveals that the photographs were discussed by the parties at the hearing. They were properly considered by the trial court as part of the explanation of the circumstances of the no contest plea. *See Cuyahoga Falls* v. *Bowers* (1984), 9 Ohio St. 3d 148, 9 OBR 438, 459 N.E. 2d 532. As such, they were properly considered on appeal, even though they were not formally admitted as record exhibits.

purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2). Accordingly, the burden of proof rests with the accused. R.C. 2901.05(A).

Appellant Young's final argument regarding the constitutionality of R.C. 2907.323 posits that the sentencing provisions of that statute are disproportionate and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution. Young contends that since the offense of possessing material showing nude minors is less serious that the offenses set forth in R.C. 2907.321(A)(5)[1] and 2907.322(A)(5),[2] the punishment should be proportionately less severe. Each of these offenses constitutes a misdemeanor of the first degree unless the defendant has previously been convicted of the same offense, in which case the subsequent offense is elevated to a felony of the fourth degree. See R.C. 2907.321(C), 2907.322(C) and 2907.323(B).

"A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State* v. *Chaffin* (1972), 30 Ohio St. 2d 13, 59 O.O. 2d 51, 282 N.E. 2d 46, paragraph three of the syllabus.

R.C. 2907.323(B) does not mandate a minimum sentence. The trial court, in imposing sentence, may exercise a considerable degree of discretion in determining the precise sentence to impose in a particular case. The court is fully empowered to tailor the punishment to the facts of the case before it, utilizing the usual sentencing criteria set forth in R.C. 2929.13 and 2929.22. Thus, while the classification of the offenses is identical, the punishments may vary considerably according to the circumstances of each case. Moreover, the offense of which appellants have been convicted is a morally abhorrent act made possible only through the cruel exploitation of innocent, abused children. By providing for the possibility of a maximum term of imprisonment of six months for first offenders, R.C. 2929.21(B)(1), the legislature intended not only to express the moral outrage of the community, but also to deter the purchase and possession of child pornography, so that the financial incentive to produce such material would be destroyed. The General Assembly has chosen to prohibit possession as a means of combating the sexual abuse and exploitation of our children. *State* v. *Meadows*, *supra* (28 Ohio St. 3d), at 51, 28 OBR at 153, 503 N.E. 2d at 704. This court is not prepared to state that the punishment imposed for possession of child pornography is disproportionate to the seriousness of the offense.

The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not protected by the First Amendment. *Roth* v. *United States* (1957), 354 U.S. 476, 14 O.O. 2d 331. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

Appellant Young next argues that the trial court erred in overruling his motion to suppress the photographs seized pursuant to the search warrant, alleging that the information in the underlying affidavit was stale and failed to establish probable cause for the issuance of a warrant. Specifically, appellant alleges that the information in the affidavit was based on statements from two witnesses, one of whom did not give dates for his observation of alleged child pornography in appellant's home, and another whose observations occurred approximately three months before execution of the warrant. We do not agree that this information was so "stale" that the issuing magistrate had no reasonable basis for believing that the materials observed by the two witnesses would still be found at Young's residence. The affidavit recites in detail the circumstances surrounding the observations of the witnesses. It recites that both informants had been "picked up" by Young, who paid them to perform sex acts and to pose in the nude for photographs; that the area specified is known to the affiant as a "pick up spot" for young male prostitutes; that the witnesses had both observed similar material depicting nude minors in Young's home; and that psychological profiles of pedophiles reveal that they do not destroy their child pornography, but rather re-live their sexual experiences through photographs of previous partners.

The alleged staleness of the witnesses' information does not, in our view, affect the validity of the warrant. We note that the affidavit was sworn to within one week after the first witness was interviewed. Given the facts detailed in the affidavit, the issuing magistrate had probable cause for believing the materials described could still be found where they had been observed. In so finding, we are mindful that affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca* (1965), 380 U.S. 102, 108. Under the circumstances of this case, which involves an offense of a continuing nature, we believe that the facts stated in the affidavit justified a finding of probable cause at the time of the issuance of the warrant. *Sgro* v. *United States* (1932), 287 U.S. 206, 210.

Appellant Osborne also attacks the sufficiency of the affidavit underlying the warrant issued in his case. Osborne contends that the affidavit failed to establish probable cause since the information therein was based on unreliable hearsay, and that the affidavit did not specify the time during which the alleged criminal activity took place. As to the time aspect, appellant's contentions are utterly baseless. In a detailed description of the circumstances giving rise to the affiant's belief that Osborne possessed child pornography, it is stated that a few days before the affidavit was sworn, two witnesses stated that the material in question was at that time in the possession of appellant. As to the hearsay element, we note that the use of information based on hearsay is permissible as long as the issuing magistrate is informed of some of the

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[1] R.C. 2907.321 provides in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any obscene material, that has a minor as one of its participants * * *."

[2] R.C. 2907.322 provides in relevant part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality * * *."

circumstances underlying the informant's conclusion that the contraband was where he claimed it to be, and why the affiant found the informant credible. *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114. We find that the affidavit in question passes muster on both counts. Both witnesses named appellant and correctly described his whereabouts. Appellant was also described as an "associate" of one of the witnesses who had just been arrested after a search of the premises retrieved a massive amount of child pornography. A cancelled check made out to appellant, showing appellant's address, was also found on the premises, as well as a mailing list containing the name and address of appellant. These facts gave the magistrate a basis for believing that the informants had reason to know that the contraband was where they claimed it to be, and provided corroboration for the affiant's conclusion that this information was worthy of belief. Thus, the affidavit enabled the magistrate to make a neutral determination of probable cause based on the totality of the circumstances. *Illinois* v. *Gates* (1983), 462 U.S. 213.

Appellant Osborne next contends that the photographs seized in the search were improperly admitted into evidence. He seems to argue that the photographs had to be identified and authenticated by the photographer before they could properly be deemed admissible. This argument borders on the frivolous. The relevance of the photographs is not dependent on whether they accurately depict the subject matter portrayed, but on whether appellant possessed the photographs and whether they are the sort of material outlawed by R.C. 2907.323(A)(3). Verification by the photographer would have no bearing whatsoever on these issues.

Appellant Osborne further argues that no proof was offered that the subject in the photographs was a minor. We cannot agree with appellant's contention that the minority of the person depicted was not demonstrated in the evidence. The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen by a substantial margin, and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As posession of these photographs alone would support appellant's conviction, we need not consider whether the state proved the minority of the subject in the sole remaining photograph.

Appellant Osborne argues that the trial court erred in failing to instruct the jury that the term "nudity" as used in R.C. 2907.323(A)(3) refers to a lewd exhibition of the genitals. However, since appellant neither requested such a charge nor objected to the instructions as given, any claim of error has been waived. Crim. R. 30; *State* v. *Underwood*, *supra*. Nor does the plain error exception have any relevance here, as the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity under R.C. 2907.323(A)(3), as we hold today. We find that no reasonable juror could believe that the photographs involved herein were anything but a lewd display. See *Underwood*, *supra*, at syllabus.

Accordingly, based upon the foregoing, the judgments of the court of appeals are hereby affirmed.

Judgments affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES, WRIGHT, and H. BROWN, JJ., concur.

BY LEGAL INTERN
JUN 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 85AP-945
: (REGULAR CALENDAR)
Clyde Osborne, :
Defendant-Appellant. :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on June 10, 1986, the assigments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

REILLY, NORRIS & LYNCH, JJ.

By _____
Judge Archer E. Reilly

LYNCH, J., Retired, of the Seventh Appellate assigned to active duty under authority of Section 6(C), Article IV, Constitution.

cc: David E. Tingley
Richard Curtner and
Gerald A. Moore

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 85AP-945
Clyde Osborne,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on June 10, 1986

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS and MR. DAVID E. TINGLEY, for appellee.

MR. RICHARD CURTNER and MR. GERALD A. MOORE, for appellant.

APPEAL from the Franklin County Municipal Court.

REILLY, J.

This is an appeal from a conviction in the Franklin County Municipal Court for one count of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(3).

Columbus police officers conducted a search of defendant's home pursuant to a search warrant issued by a judge of the Franklin County Municipal Court on July 22, 1985. They seized a photo album during the search that contained four photos, which were the subject of the conviction involving this appeal.

Several motions were filed prior to trial including a motion to dismiss, a motion to suppress the photographs, and a motion for particular

jury instructions. These motions were overruled. The cause proceeded to trial and a jury returned a verdict of guilty.

Defendant has timely appealed and advances the following assignments of error:

"I. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 11 and 16, of the Ohio Constitution, because this statute is unconstitutionally vague and overbroad on its face.

"II. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 11 and 16, of the Ohio Constitution, as applied to appellant because it punishes mere private possession of minor-nudity material.

"III. The trial court erred in overruling appellant's motion to suppress evidence obtained on the basis of the search warrant because the warrant's affidavit was facially defective, violating appellant's rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 14, of the Ohio Constitution.

"IV. The trial court erred to the prejudice of the appellant by admitting into evidence, without authority to do so, irrelevant, unauthenicated photographs for the purpose of proving the age of the person depicted, thus denying the appellant a fair trial and due process of law as guaranteed by Article I, Section 16, of the Ohio Constitution and the Fourteenth Amendment of the U.S. Constitution.

"V. The trial court erred in overruling appellant's motion for a mistrial on the grounds that testimony volunteered by a police officer was in violation of a motion in limine ordering exclusion of evidence relating to postal inspectors, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VI. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of the state's evidence, violating appellant's rights under the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"VII. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of all the evidence because insufficient evidence of probative value was submitted as to several elements of the crime and because a conviction is against the manifest weight of the evidence, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VIII. The trial court's refusal to charge the jury with appellant's requested special jury instructions denied appellant a fair trial in violation of the due process clauses of the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"IX. Appellant's conviction for mere possession of 'minor-nudity' material, where appellant came into possession of such material years before O.R.C. 2907.323(A)(3) was enacted and where appellant's conduct is entirely passive, violates appellant's rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution."

The first and second assignments of error are considered together, as they are interrelated. Defendant contends that R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad on its face and violates his right to privacy. R.C. 2907.323 provides, in pertinent part:

> "(A) No person shall do any of the following:
>
> "***
>
> "(3) Possess or view any material *** that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> "(a) The material *** is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational,

> religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material ***.
>
> "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material *** is used ***."

Defendant's challenges to the constitutionality of the statute were previously addressed by this court in two recent decisions: State v. Modeen (April 17, 1986), No. 85AP-907, unreported (1986 Opinions 831); and State v. Sandera (April 24, 1986), No. 85AP-594, unreported (1986 Opinions 942).

In Modeen, this court held that New York v. Ferber (1982), 458 U.S. 747, supports the determination that the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography. This court also construed "state of nudity" to only include lewd exhibitions of the genitals, thus defeating any overbreadth contention. In Sandera, we found that by considering the entire statute, it was apparent that the legislature had defined nudity-oriented material to apply to the depiction of nudity which is devoid of any legitimate purpose. The photographs involved in this case show a young boy in a state of nudity, lewdly exhibiting his genitals. The statute proscribes possession of such photographs.

Thus, defendant's first and second assignments of error are not well-taken.

Defendant contends in the third assignment of error that the court erred by overruling his motion to suppress evidence obtained on the

basis of the search warrant. Defendant maintains that the warrant's affidavit is facially defective because it lacks any indication of when defendant came into possession of the photographs. Moreover, defendant claims that the affidavit contains hearsay which is not credible because it is exculpatory in nature.

The affidavit was signed by Detective James Phillips, who based his testimony on information he received from a Cleveland Postal Inspector, who had in turn received his information from a Florida Postal Inspector. The affidavit indicated that surveillance of an individual in Florida had resulted in the seizure of child pornography there from Jack Smith and another individual, Dan Knous, who had been arrested in Florida. Both men implicated the defendant as possessing negatives of child pornography. During a search of Smith's residence, pursuant to a federal search warrant, a mailing list was seized containing defendant's name and address. Further, a cancelled check made to the order of defendant and dated June 3, 1985 was also seized as part of the search.

Crim. R. 41(C) provides:

> "*** The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. ***"

Defendant asserts that the hearsay statements of Smith and Knous were not reliable because they were exculpatory in nature. The state contends these statements were reliable as they were against penal interests. It is noteworthy, however, that such statements were not the only evidence before the court. There was also the mailing list with defendant's name and a cancelled check. This other evidence, together with the statements of Smith and

Knous was sufficient to establish probable cause when the totality of the circumstances test is applied as required by Illinois v. Gates (1983), 462 U.S. 213.

Defendant further contends that the search warrant affidavit is defective because it does not state when defendant came into possession of the negatives. Hence, there was no probable cause to believe defendant was still in possession at the time the affiant prepared the affidavit.

The facts in the affidavit indicate that Smith and Knous were arrested on July 19, 1985, three days before the warrant was issued. At that time, both men stated that defendant had the negatives. Although it was not established when defendant possessed them, there were sufficient facts to justify the issuance of the warrant. In State v. Marko (1973), 36 Ohio App. 2d 114, this court held that a search warrant is valid and the evidence on which it is based is not stale if law enforcement officers applied for the warrant as soon as they became aware of the location of the evidence. Marko involved a possessory crime which was held to be a continuing offense. This same rationale applies to the facts in the instant case.

Hence, defendant's third assignment of error is not well-taken.

Defendant maintains in the fourth assignment of error, that the court erred in admitting into evidence four photographs. Defendant contends these photographs were irrelevant and unauthenticated as required by Evid. R. 901.

This allegation is not well-taken. The photographs were relevant since defendant was charged with possessing material that showed a minor in a state of nudity. Possessing the photographs was, consequently,

the substance of the charge, and the photographs were definitely relevant evidence. As to the authentication issue, defendant seems to contend that these photographs had to be authenticated by the photographer before they were admissible. Such a requirement would unduly limit the effect of R.C. 2907.323(A)(3). Detective Phillips testified that the photographs were found in defendant's home. Defendant also testified that the photographs were given to him by a friend, that he arranged them in a photo album and that the album was kept in his residence. This was sufficient identification to render the photographs admissible.

Defendant's fourth assignment of error is not well-taken.

Defendant contends in his fifth assignment of error that the court erred in failing to declare a mistrial when a witness testified in violation of a motion in limine. The court granted a motion in limine before trial excluding any evidence as to the basis for the search warrant. Defense counsel sought to exclude any evidence of additional federal charges regarding misuse of the mail. During the testimony of Detective Phillips, the officer was asked whether in executing the search warrant there were several officers present. Detective Phillips responded that there were three other officers and two postal inspectors. Following defense counsel's motion for a mistrial, the court, in denying the motion, found that the motion in limine barred evidence that the police had received any information from the postal inspectors for the search warrant. The court further found that Detective Phillips' answer was not in direct violation of the order and was not prejudicial to defendant.

The trial court's ruling was correct. As stated in State v. Hymore (1967), 9 Ohio St. 2d 122, at 128:

> "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere."

Considering the trial court's proper finding that this testimony was not in direct violation of the motion in limine, and that defendant was not materially prejudiced by this evidence, there was no abuse of discretion.

Defendant's fifth assignment of error is also not well-taken.

In the sixth and seventh assignments of error, defendant contends that the court erred in overruling his Crim. R. 29(A) motion for acquittal for several reasons. Defendant first claims that there was no evidence that the material he possessed showed a "minor" as required by R.C. 2907.323. Nevertheless, Detective Phillips testified that the defendant told him he thought the boy in the photograph was fourteen years old when the pictures were taken. Moreover, the photographs speak for themselves as they manifestly show a young boy. The defendant further contends that the state did not establish that the boy in the photographs was not the defendant's child or ward. Defendant himself testified that the boy was not in either category.

Finally, defendant maintains that the state failed to present any evidence that the exceptions in R.C. 2907.323(A)(3) did not apply to defendant. A review of the transcript reveals that the state presented sufficient evidence to establish a prima facie case against defendant; that he possessed a depiction of a child in a state of nudity and that the depiction involved lewdness, eroticism, lechery, salaciousness, voyeurism or other exploitive, unwholesome motivations. See Sandera, supra. If the

defendant wished to contravene that prima facie case, it was incumbent upon him to introduce evidence that the depiction served one of the legitimate purposes set out in R.C. 2907.323(A)(3)(a) or (b).

Whereupon, defendant's sixth and seventh assignments of error are not well-taken.

Defendant maintains, in the eighth assignment of error, that the court erred in refusing to give requested instructions to the jury. Defendant requested the court to instruct the jury that a minor was a person not over fifteen years of age. Defendant cites R.C. 2907.04, 2907.21, and 2907.22 in support of his contention. R.C. 2907.04 defines corruption of a minor, whereas, R.C. 2907.21 and 2907.22 relate to prostitution. Although these statutues increase the penalty for conduct with minors less than sixteen years of age, the committee comments following thereafter explain that the prohibited conduct is considered more harmful to persons in early adolescence. They do not permit similar conduct with those over sixteen years of age. Thus, the term "minor" takes on an atypical meaning for purposes of those statutes, as it is only meant to refer to those under sixteen years of age.

The term "minor" is not specifically defined in the criminal code. Nonetheless, R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. ***" The common and ordinary meaning of the term "minor" is a person under the age of eighteen years. This is the definition the court gave to the term "minor," which was a correct definition. Further there was sufficient evidence for the jury to find that the boy involved in these photographs was not over fourteen years old.

Defendant also requested the court to read the entire statute in its charge to the jury. The court refused in the absence of evidence on any of the exceptions. Although it is perhaps a better practice to read the statute and exceptions together, considering this court's holding in Sandera, supra, there was no prejudicial error in this case by the court's refusal to do so. There was no evidence presented requiring the jury to determine whether one of the exceptions applied to defendant. Furthermore, the photographs plainly met the definition of lewd exhibition of genitals.

Defendant's eighth assignment of error is not well-taken.

In the final assignment of error, defendant asserts that his conviction violates due process because he came into possession of the prohibited material prior to the effective date of the statute. As noted above, a possessory offense is a continuing offense. Defendant was charged with possessing the materials on July 22, 1985. The evidence presented at trial was sufficient for the jury to find defendant guilty of the proscribed conduct. We find no denial of due procees in this case.

Defendant's ninth assignment of error is not well-taken.

For the foregoing reasons, defendant's assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

NORRIS and LYNCH, JJ., concur.

LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Constitution, in the Tenth Appellate District.

No. _____

FRANKLIN COUNTY
MUNICIPAL COURT
Columbus, Ohio

THE STATE OF OHIO

vs.

North Park Street
Apt. #3
Columbus, Ohio 43213

SEARCH WARRANT
Daytime/Nighttime, and Ordered
Issue of the Court

TED HYSELL
Clerk of the Municipal Court
By: _____ Deputy

Ordered on Affidavit of
Det. James Phillips
CPD—Child Porno Task Force

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CLERK

WARRANT TO SEARCH

THE STATE OF OHIO,
FRANKLIN COUNTY,
CITY OF COLUMBUS, } ss.

To the Chief of Police of the City of Columbus, Ohio, Greetings:

WHEREAS, there has been filed with me an affidavit, a copy of which appears on the reverse side, these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime ~~(or nighttime)~~ into premises known as

793 North Park Street, Apt. #3,
Columbus, Ohio 43213

and to execute a search of the said premises within 5 days after the issuance of this warrant. The said premises being in the City of Columbus, Ohio, aforesaid, and there diligently search for (the said goods, chattels, or articles), to-wit:

Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Kraus or Century 20th Studios or P. O. Box 3039, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios.

and that you bring the same or any part thereof, found on such search, forthwith before me, or some other judge of this court having cognizance thereof, to be disposed of and dealt with according to law.

Marvin D. Ramoff
Judge Franklin County Municipal Court, Columbus, Ohio
7/22/83 at 5:33 P.M.

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SEARCH — WARRANT AFFIDAVIT

THE STATE OF OHIO,
FRANKLIN COUNTY,
CITY OF COLUMBUS, } ss. Franklin County Municipal Court, Columbus, Ohio

Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Det. James Phillips, CPD
Child Porno Task Force

who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that

Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Kraus or Century 20th Studios or P. O. Box 3039, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios.

are being kept in a certain building or room or location described as follows, to-wit: 793 North Park Street, #3 Apartment, Columbus, Ohio 43213

in said City of Columbus, Ohio, in violation of section 2907.321, 2907.322, 2907.323, O.R.C.,
as fruits, evidence or instruments

The facts upon which such belief is based are as follows: on 7-22-83 the affiant spoke with U.S. Postal Inspector Paul M. Hartman, Cleveland, Ohio, who related the following to the affiant: On or about June 11, 1982 U.S. Postal Inspector P.M. Hartman, Cleveland, Ohio, initiated test correspondence with Century 20th Studios, P. O. Box 3039, Holiday, Florida 33590. In such correspondence Jack S. Smith, a principle in Century 20th Studios, offered inspector Hartman various photographs depicting sexually explicit activity between adults and minors. In an item of correspondence dated June 13, 1983, Smith wrote to inspector Hartman "At (Continued, & attachment 28)

And requests that search be made in the daytime (or nighttime) and that warrant authorize seizing the articles described above, if found, and bring same or any part thereof before this Court or any other court having cognizance thereof, to be disposed of according to law.

Det. James Phillips #73
Affiant

Sworn to before me and subscribed in my presence this 22nd *day* July
A. D. 19 83.

Marvin D. Ramoff
Judge Franklin County Municipal Court, Columbus, Ohio

Date: 7/22/83
Time: 5:35 p.m.

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The facts upon which such belief is based are as follows: [illegible] time I had an extensive collection of male/female action photographs, male/male action pictures, also, however, all such prints were sold out through an ad in the Advocate. I cannot have any copies made in as much as the negatives are in possession of a friend of mine in Ohio. I had over 1,000 negatives of both hard and soft core photographs and I still retain ownership of same and, no doubt, will have them back within a short period of time. However, as suggested, please write to me and let me know what type photographs you are interested in. All models used are young - both boys and girls."

On or about July 13, 1983 Postal Inspector P.M. Hartman mailed a test letter, addressed to Box Holder, P. O. Box 3034, Holiday, Florida 33590, under cover to Postal Inspector Daniel Witonski. Such test letter contained an original U.S. money order issued in the amount of $10.00 pre-payment for photographs of minors engaged in sexually explicit conduct.

On or about July 17, 1983 Postal Inspector Daniel Witonski placed the above described test letter into P. O. Box 3034, Holiday, Florida and maintained visual surveillance of said P.O. Box. During the course of that surveillance, Inspector Witonski observed Jack S. Smith remove said test letter from said Post Office Box and proceed directly to Smith's residence.

Inspector Witonski and other officers maintained a continual surveillance of the Smith residence until approximately 1 1/2 hours later when Smith emerged from the residence and entered his vehicle. Inspector Witonski continued to maintain the surveillance of the activities of Jack S. Smith and followed Smith directly to the Holiday Florida Post Office. Upon arrival at the Holiday Florida Post Office, Smith was observed by Inspector Witonski to deposit into the mails, two letters. At such time that these observations were made, Inspector Witonski terminated the surveillance.

Inspector Witonski then made a visual observation of the mail receptacle into which Smith deposited the above described two letters. Such observation disclosed the presence of a

Det James A Bolton 777

Sworn to before me and subscribed in my presence this 22 day July

A.D. 1983

Marvin L. Resnick

Judge Franklin County Municipal Court, Columbus, Ohio

7-22-83

5:35 p.m.

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ATTACHMENT #2 continued

of a letter bearing the return address of P. O. Box 3034, Holiday, Florida 33590 addressed to the confidential test name and address employed by Inspector P. M. Hartman in the conduct of this investigation. Inspector Witonski removed this said letter from the U.S. mails and having been so authorized by Inspector P. M. Hartman, opened said letter.

Upon opening said letter, Inspector Witonski found said letter to contain a two-page item of correspondence endorsed "Jack Smith" and 20 color photographs depicting minors below the age of 18 years engaged in sexually explicit conduct. Further searches of these photographs depicted sexual contact between minor females and an adult white male later identified by Inspector Witonski as Daniel S. Knaus, also a principle in Century 20th Studios.

On or about July 19, 1983, Postal Inspector Daniel Witonski and other officers executed a federal search warrant upon the premises of the Smith residence and arrested Jack S. Smith and Daniel S. Knaus on federal charges arising from the use of the U.S. mails to distribute child pornography materials. During the conduct of the search Inspector Witonski discovered thousands of photographs depicting minors engaging in sexually explicit conduct as well as various records, papers and correspondence bearing upon the sale of such photographs.

Following his arrest, Jack S. Smith was advised of his Constitutional Rights per the Miranda decision and was questioned by Inspector Witonski as to the location whereat the photographic negatives, which were the source of such photos were secreted. Smith responded "they're with a friend of mine in Ohio named Clyde."

Similarly, Daniel S. Knaus was advised of his Constitutional Rights following his arrest and was also questioned by Inspector Witonski concerning the location whereat the photographic negatives from which such photographs had been produced were secreted. Knaus related to Inspector Witonski that all such negatives were in possession of an associate of Smith's named Clyde Osborne, who resides in the Columbus, Ohio area.

During the conduct of the execution of said search warrant, Inspector Witonski located various mailing lists, one of such mailing lists including the name address of Clyde Osborne, 793 North Park Street, #3, Columbus, Ohio 43213.

Further, on the morning of 7-22-83, while reviewing evidence seized incident to the execution of a federal warrant at the Smith residence, Inspector Witonski located a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.30 dated 6-3-83. A review of the reverse of said cancelled check disclosed that the address of 793 North Park Street, #3, Columbus, Ohio 43213, was inscribed thereon. Further, a review of said cancelled check disclosed that said check was stated at Christie's Market, 680 North High Street, Columbus, Ohio telephone 229-[illegible].

Det James A Bolton 777
Police Officer

Sworn to before me and subscribed in my presence this 22nd day July

A.D. 1983.

Marvin L. Resnick
Judge Franklin County Municipal Court
Columbus, Ohio

7-22-83
5:35 --

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RET . N[illegible] RECEIPT, INVENTORY OF SEARCH WARRANT

THE STATE OF OHIO,
FRANKLIN COUNTY, } ss.
CITY OF COLUMBUS }

I, the officer taking property hereunder, received the attached search warrant on July 22,
19 83, and executed it as follows: On 7-22, 1983, at [illegible] o'clock P.M., I searched the
N. Park St., #3 described in the warrant and left a copy of the warrant (with/or)
(the premises searched)
Clyde Osborne
(name of person in charge of premises when left or the place of search)
together with a copy of this inventory and Receipt for the items seized. The following is
an INVENTORY of property taken pursuant to the warrant and prepared by Lt T.A. Phillips
(officer taking property)

Letter To Jack Smith
Brown Envelope Containing Negatives
Brown Photo Albums
Misc. Photos
Kodachrom Film
Photo From Frame Behind
Brown
Letters
Lubitel 2 120 Camera Case & Flash
Misc News Clippings
Ohio Gay Guide.

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CLERK OF COURTS
FRANKLIN COUNTY, OHIO

This inventory was made in the presence of (Circle one) 1. [illegible] the applicant for
the warrant and [illegible] the person from whose possession (or) from whose premises
the property was taken. 2. [illegible] (name) and [illegible] (name), acting in the absence of [illegible]
(applicant or person from whom ...)

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant
and a copy of this inventory was deposited with the person or the premises from which the property was
taken or a Receipt of the items taken

[illegible]
(Signature of officer taking)

Subscribed and sworn to and returned before me this [illegible] day of [illegible], 19[illegible]

[illegible]
(Notary Public)

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Supreme Court, U.S.
FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

CASE NO. 88-5986

IN THE UNITED STATES SUPREME COURT

October Term, 1988

CLYDE OSBORNE, APPELLANT

-vs-

STATE OF OHIO, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF OHIO
APPELLEE, STATE OF OHIO, MOTION TO DISMISS OR AFFIRM

S. Adele Shank
Ohio Public Defender Commission
8 East Long Street
Columbus, Ohio 43266-0587

John Quigley
David Goldberger
Ohio State University
College of Law
Clinical Programs
1659 N. High St.
Columbus, Ohio 43210

Counsel for Appellant

Ronald J. O'Brien
Columbus City Attorney
City Hall
90 West Broad Street
Columbus, Ohio 43215
(614)222-7385

Counsel for Appellee

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment and Stanley v. Georgia 394 U.S. 557 (1969) prohibit the State of Ohio from criminalizing the possession of child pornography in the privacy of the home?
2. Do the First and Fourteenth Amendments require a state to provide for a more culpable mental state than that of recklessness when prohibiting the possession of child pornography?
3. Did the authoritative construction of the child pornography statute by the Ohio Supreme Court violate Appellant's Fourteenth Amendment right to due process?
4. Is the use of hearsay information in an Affidavit in Support of a Search Warrant prohibited by the Fourth Amendment?

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JURISDICTION

The Appellant asserts jurisdiction under 28 U.S.C. § 1257(2) because he claims that Section 2907.323(A)(3), Ohio Revised Code, is repugnant to the United States Constitution, where the decision in this case by the Ohio Supreme Court was in favor of the validity of the Ohio statute.

As set forth herein, the Ohio statute, either on its face as authoritatively construed or as applied, does not violate the Constitution and for that reason the appeal should be dismissed or summarily affirmed because a substantial federal question is not presented for review.

FACTS

In June, 1985, United States postal inspectors began an investigation of Century Twentieth Studios in Holiday, Florida, regarding the use of the United States mails to transmit child pornography.

As a result of that investigation, postal inspectors had correspondence with Jack S. Smith, a principal in Century Twentieth Studios. Smith and a postal inspector had correspondence through the mails and Smith offered the postal inspector various photographs depicting sexually explicit activity between adults and minors. In one such item of correspondence Smith wrote to the postal inspector that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend of his in Ohio. Subsequently, a test letter was addressed and delivered to a post office box holder in Holiday, Florida, in which the postal inspectors ordered and paid for child pornography. Pursuant to that order Smith deposited in the U.S. mails an envelope that contained twenty color photographs of minors engaging in sexually explicit conduct.

As a result of this investigation on July 19, 1985, postal inspectors executed a federal search warrant on the premises of Jack S. Smith and Daniel S. Knous in the State of Florida, seized thousands of photographs which depicted minors engaging in sexual conduct, as well as other books and records. Smith and Knous were arrested on federal charges.

After his arrest, Smith advised Postal Inspector Witouski that photographic negatives of child pornography were in the possession of a friend of his in Ohio named Clyde. Knous, after his arrest, advised Postal Inspector Witouski that the child pornography negatives were in the possession of an associate of Smith's named Clyde Osborne, who resided in Columbus, Ohio.

During the execution of the federal search warrant in Florida, mailing lists were seized. Included on one such mailing list that was seized by the postal inspectors was the name of Clyde Osborne, 793 North Park Street, No. 3, Columbus, Ohio, 43215. When Postal Inspector Witouski reviewed the evidence seized from the federal search warrant on July 22, 1985 he located among that evidence a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 (Three dollars and 50/100), dated June 3, 1985. The reverse side of the cancelled check disclosed that

the address of 793 North Park Street, No. 3, Columbus, Ohio, 43215 was inscribed thereon, and that said check had been cashed at Christie's Market, 680 North High Street, Columbus, Ohio, which is within several blocks of Osborne's address on Park Street.

Postal Inspector Witouski notified U.S. Postal Inspector Paul Hartman, Cleveland, Ohio, who related all of the above information to Detective James A. Phillips, Columbus Police Department, Child Pornography Task Force.

Detective Phillips applied for and obtained a search warrant based on the above information to search the premises of Clyde Osborne at 793 North Park Street, No. 3, Columbus, Ohio, 43215 for child pornography. A copy of the search warrant is attached to Appellant's Jurisdictional Statement filed in this Court.

Among the items seized from Osborne's home were four Polaroid color photographs of a young male white who was not only in a state of nudity but posing in such photographs in a lewd and lascivious manner with a graphic focus on the boy's private parts. The photographs were marked on the back with a notation "Tommy – 13". (R.53). When Osborne was interviewed after his arrest by Detective Phillips he stated that at the time the photograph was taken that the boy depicted therein was fourteen years of age. (R.54).

Osborne was charged by criminal complaint in the Franklin County Municipal Court with a violation of Section 2907.323(A)(3), Ohio Revised Code, in that he possessed child pornography in the form of the nude photographs described herein.

Osborne entered a not guilty plea and demanded a trial by jury. The State called two police detectives as witnesses and introduced the four photographs into evidence. After testimony by the defendant the case was submitted to the jury. The jury found Osborne guilty of violating Section 2907.323(A)(3), Ohio Revised Code.

The intermediate Ohio Court of Appeals affirmed Osborne's conviction and the Ohio Supreme Court, in a joint opinion involving another defendant in a similar case named Denis Young, upheld the conviction. Osborne had challenged the Ohio statute on grounds of vagueness, overbreadth, and First Amendment rights of speech and privacy; the validity of the search warrant; and the use of the photographs which were the subject of the charge as evidence in the trial of the case. In affirming the conviction, the Ohio

Supreme Court authoritatively construed the Ohio statute and found that it was not vague, overbroad, and there was no right to possess child pornography in the privacy of one's home. The search warrant was also upheld.

Osborne has filed a notice of appeal to the United States Supreme Court and it is before this court on Osborne's jurisdictional statement.

Many of the issues raised by Osborne in this case are the same as those raised in the case of Commonwealth of Massachusetts v. Oakes 518 NE 2d 836 (1988), cert granted _____ U.S. _____, U.S. Supreme Court Case No. 87-1651, currently scheduled for oral argument before the Court on January 17, 1989.

ARGUMENT

I. VAGUENESS AND OVERBREADTH

In combatting the nationwide problem regarding child pornography which was described by this Court in New York v. Ferber 458 U.S. 747 (1982), the Ohio General Assembly adopted a series of statutes in Chapter 2907, Ohio Revised Code, to address the production, distribution, and possession of child pornography. One of those statutes was Section 2907.323, Ohio Revised Code, which in pertinent part with respect to this case prohibits the possession of material or performance that shows a minor who is not the persons' child or ward in a state of nudity, unless within one of two statutory exceptions. As authoritatively construed by the Ohio Supreme Court, that statute is not vague nor overbroad and does not infringe upon an unspecified right to possess child pornography in the privacy of one's home.

The Ohio Supreme Court authoritatively construed the statute to apply to lewd exhibition of the genitals or graphic focus on the genitals, where a minor, defined as one below the age of 18, is depicted in that photograph. The statute itself, as recognized by the Ohio Supreme Court, provides affirmative defenses to possession of that type of material when possessed for bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by certain specified types or groups of individuals.

The authoritative construction by the Ohio Supreme Court of the Ohio statute is consistent with this court's decision in New York v. Ferber, supra where a New York statute prohibited the use of a child in a sexual performance. Sexual performance was defined as any performance which included "sexual conduct", which term was defined to include the "lewd exhibition of the genitals". Thus, the sexual conduct that was prohibited involving minors in the Ferber case included nudity if such nudity involved the lewd exhibition of the genitals. That was recognized by the Ohio Supreme Court in this case, and that Court authoritatively construed the Ohio statute consistent with this Court's viewpoint as expressed in Ferber. As was noted by this Court in Ferber, "the term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation." Ferber, supra at 765.

Like the Ferber court, the Ohio Supreme Court determined that the Ohio statute was not substantially overbroad by including lewd exhibition of the genitals within its reach, and whatever overbreadth may exist can be cured through a case by case analysis.

The Ohio Supreme Court's opinion is consistent with the interpretation of the federal child pornography statutes. See 18 U.S.C. Section 2251 et seq. "Sexually explicit conduct" under former 18 U.S.C. 2253 was defined to include "lewd exhibition of the genitals or pubic area of any person" when applicable to minors. Relying upon Ferber, the application of the federal child pornography law has been upheld with respect to nude photographs of minors when challenged as vague and overbroad. United States v. Nemuras 567 F. Supp. 87 (D. Maryland 1983), affirmed 740 F. 2d 286 (4th Cir. 1984). As noted by the Court in Nemuras, the word "lewd" has a generally well-recognized meaning, connoting sexual suggestiveness, and found that the photographs therein met that definition. The federal statute has since been amended to redefine "sexually explicit conduct" as "lascivious exhibition of the genitals or pubic area of any person" as applied to minors. 18 U.S.C. Section 2252(2)(E). The Ohio Supreme Court's interpretation of the statute in question by limiting its application to a lewd exhibition of the genitals or a graphic focus on the genitals is neither overbroad nor vague, is consistent with this Court's Ferber decision, and does not raise a substantial federal constitutional question. It was just such a vagueness and overbreadth argument that caused this Court in Ward v. Illinois 431 U.S. 767 (1977) to uphold a facially overbroad state obscenity statute that had been "narrowed" by an "authoritative construction" of a state's highest court in light of the decision and guidelines in Miller v. California 413 U.S. 15 (1973). The Ohio Supreme Court did nothing more in this case.

Osborne's second complaint about the statute is that it is vague because the term "minor" was not specifically defined, and the Ohio Supreme Court has construed this term to mean those below the age of 18.

It is well established that a legislative body need not define every word it uses in a statute. Under Ohio law, any term left undefined by statute is to be accorded its common, every day meaning. See Section 1.42, Ohio Revised Code and Eastman v. Ohio 131 Ohio St. 1 (1936). The common, ordinary meaning, together with an Ohio Revised Code definition of both juvenile and minor, are not likely to confuse a person of ordinary intelligence who is seeking fair warning of what conduct is proscribed. The term "juvenile" is defined in Section 2907.01(I), Ohio Revised Code, to mean an unmarried person under the age of 18. More importantly, with respect to this case, Section 1339(31)(K), Ohio Revised Code, specifically defines the term "minor" to mean a person

who has not attained the age of 18 years. That is the common and ordinary meaning of the term minor. The dictionary definition is one who has not yet reached the age of majority. Webster's Collegiate Dictionary page 727 (G. and C. Merriam Company, 1981). For purposes of voting, the United States Constitution, 26th Amendment, defines the age of majority as 18.

Based upon the above, it should have been clear to Osborne and others, that the term minor, by its dictionary definition, its ordinary and common everyday usage, and reference to the statutory definition of both juvenile and minor in the Ohio Revised Code, that its meaning was one who had not yet obtained the age of 18. Given the above, to no one's surprise, the Ohio Supreme Court authoritatively construed Section 2907.323, Ohio Revised Code, to apply to those under the age of 18. That authoritative construction, in the absence of a specific definition in Section 2907.323, Ohio Revised Code, renders the statute neither vague nor overbroad, nor does such construction retroactively attempt to take advantage of Osborne.

With respect to overbreadth, the Ohio Supreme Court reviewed the statutory scheme adopted by the State of Ohio with respect to child pornography and concluded that it punished conduct not pure speech, and the affirmative defenses set forth in this statute regarding appropriate purposes to possess such material narrowed the scope of the reach of that statute, and when so narrowed, was not overbroad.

II. THERE IS NO FIRST AMENDMENT RIGHT TO PRIVATELY POSSESS CHILD PORNOGRAPHY.

Osborne claims in this Court that Section 2907.323, Ohio Revised Code, is an unconstitutional violation of his First and Fourteenth Amendment rights of free speech and privacy because the possessory offense permits punishment for mere private possession in one's own home of child pornography. This claim is based upon Stanley v. Georgia 394 U.S. 557 (1969), which held that the mere private possession of obscene material in one's home was not permitted under the First and Fourteenth Amendments.

The State of Ohio contends that the First Amendment is not absolute and that there are compelling reasons which justify the State in distinguishing between child pornography and obscene material for First Amendment purposes under Stanley. A state is not foreclosed from criminalizing conduct merely because it occurs within the confines

of the home. Stanley itself acknowledges that the decision did not infringe upon the power of the state to make possession of other items, such as narcotics, firearms or stolen goods, a crime merely because the offense happened with the confines of the home. See Stanley, supra at 568, Footnote 11.

The Stanley decision turned upon the Court's finding that the Georgia statute infringed fundamental liberties protected by the First and Fourteenth Amendments. The state contends that there is no fundamental right or liberty under our Constitution to possess material which depicts children engaging in sexual conduct or nude photographs which depict genitals in a lewd manner.

This Court's decision in New York v. Ferber 458 U.S. 747 (1982) has already made the distinction between obscene material and child pornography, where the conclusion was necessary that the states do not offend the First Amendment when they regulate child pornography which does not meet the definition of obscenity.

If Ferber means anything, it stands for the proposition that states may treat child pornography differently, and more strictly, that obscene material consistent with the First Amendment.

For the Appellant to prevail in this Court upon that issue it is necessary to conclude that there is a "fundamental right" to possess child pornography in the privacy of the home, which right is secured by a combination of the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution. Suffice it to say that such a right is not explicitly secured by an individual, or combination, of the above amendments. It is only when this Court concludes that such a fundamental right exists that Stanley would extend to Osborne the right to possess child pornography in the privacy of his own home. The fundamental rights which have been discovered in the Constitution that are not explicit therein have been characterized as those liberties that are deeply rooted in this nation's history and tradition, or those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. The State of Ohio is confident that this Court is unwilling to find that the right to possess child pornography in the privacy of one's home is such a fundamental right.

However, even if this Court feels that there exists such a fundamental right in the Constitution to possess child pornography in the privacy of one's own home, then the state contends that there is a sufficiently compelling state interest which justifies the

subordination of that fundamental right to state regulation. This Court has held that the government may regulate First Amendment rights when there are extraordinary circumstances or other compelling governmental interests. In delivering the opinion of the Court in New York v. Ferber, at 749 and in Footnote No. 1 Justice White summarizes the problem which sufficiently establishes the state's substantial and compelling interest which would override any fundamental right this Court would grant to Osborne and others to privately possess child pornography. Those compelling reasons are the protection of our children from sexual exploitation, and the photographic memorialization of child sexual abuse.

Finally, with respect to this Stanley issue, Ohio would submit that two decisions of this Court have already adjudicated this issue by dismissals for want of a substantial federal constitutional question. See State v. Jordan 665 P.2d 1280 (Utah Sup. Ct. 1983, Appeal Dismissed sub nom., Fullmer v. Utah, Case No. 83-5320, 464 U.S. 910 (1983); Geever v. Illinois 522 NE 2d 1200 (Illinois Sup. Ct. 1988), Appeal Dismissed ___ U.S. 44 Crim. Law Rptr. 4061 (10-31-88).

III. SCIENTER

As the Court can see, Section 2907.323, Ohio Revised Code, does not explicitly or specifically provide a culpable mental state or scienter for the commission of the offense. As was noted by this Court in New York v. Ferber, supra at 765 "as with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." Ohio law, and the Ohio Supreme Court, has imposed "some element of scienter" with respect to Section 2907.323(A)(3), Ohio Revised Code.

Section 2901.21(B), Ohio Revised Code, provides that when the section defining a criminal offense does not specify a specific degree of mental culpability, that unless there is a plain indication to impose strict liability, then the mental state of "recklessness" is required for the person to be guilty of the offense. Recklessly is one of four mental states applicable in Ohio and is defined in Section 2901.22(C), Ohio Revised Code. The mental states, and degrees of culpability in Ohio, are purposely, knowingly, recklessly, and negligently.

Recklessness is defined in that statute as follows:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." (Emphasis Added.)

That definition, which both by statute and the Ohio Supreme Court decision in this case, are incorporated into Section 2907.323, Ohio Revised Code, provides "some element of scienter" which Ferber indicate is required in child pornography statutes. Since Ohio requires scienter, contrary to the assertions of Osborne, there is no substantial federal constitutional question.

IV. SEARCH WARRANT

The search warrant is attached to the Appellant's Jurisdictional Statement, and most of the substantial facts contained in that search warrant are set forth in the statement of facts presented by the State of Ohio herein. Both Ohio Rule 41 of Criminal Procedure and Federal Rule 41 of Criminal Procedure permit the use of hearsay in the affidavit in support of a search warrant application. As long ago as Jones v. United States 362 U.S. 257 (1960) this Court specifically held that hearsay was permissible in a search warrant application. Double hearsay has been specifically approved. United State v. Fiorella 468 F. 2d 688 (2nd Cir. 1972). The fact that this search warrant involved obscene material or child pornography does not require a higher level to be established than that applicable generally under the Fourth Amendment with respect to other criminal offenses in the establishment of probable cause. New York v. P.J. Video 475 U.S. 868 (1986).

The search warrant is to be measured by the totality of the circumstances test of Illinois v. Gates 462 U.S. 213 (1983), rather than the abandoned Aguilar-Spinelli two prong test, which the Appellant has cited in his brief.

When the Court looks to the totality of the circumstances test the information contained in the search warrant is more than adequate to comply with the Fourth Amendment. Smith and Knous' statements were declarations against penal interest which provided trustworthiness to the information which they supplied to the postal inspectors. The information concerned confederates and co-conspirators. From the time that

information was first supplied by the child pornography suspects in Florida, it remained in the law enforcement realm, although it was related to a Postal Inspector in Cleveland, who related it to the detective in Columbus. The State does not view this information as "triple hearsay" as posited by Osborne, because the information was provided to law enforcement officers who had common knowledge and the same interest in enforcing the law. Thus, under the totality of the circumstances test, and considering that the name of Osborne was on the Florida child pornographer's mailing list together with the cancelled check, the information was sufficient to support the search warrant. Finally, there is no indication that the officers, even if that information was insufficient, were not acting in good faith in executing the search warrant and the evidence would have been admissible in any event under United States v. Leon 468 U.S. 897 (1984).

V. AUTHENTICATION OF PHOTOGRAPHS

Throughout this case the Appellant has claimed there was a lack of a foundation to support the admissibility of properly authenticated photographs. The state has never quite understood how this should be accomplished. Would the Appellant Osborne require the state to produce the person who took the photograph to testify that it is a "true and accurate representation of the young man at the time the photograph was taken"? If that type of requirement is imposed, no child pornography case could be successfully prosecuted.

The State had sufficient evidence before the trial court, and in the record, to justify the admission of the photographs, in addition to establishing that a minor was depicted therein. As noted in the Statement of Facts, and conveniently omitted by Appellant in his Jurisdictional Statement, in addition to the photographs themselves there was an admission by Osborne that the party in the photograph was fourteen, and there were notations on the back of the photograph that the person depicted therein was Tommy, at age 13.

The Constitution of this country certainly requires no more authentication of a photograph to be admissible in a child pornography case than what was presented to the trial court herein. Therefore, there is no substantial federal constitutional question warranting the exercise of this Court's jurisdiction with respect to that issue.

VI. RETROACTIVITY

Appellant apparently claims that because the Ohio Supreme Court provided an authoritative construction of Section 2907.323, Ohio Revised Code, that his conviction should be set aside. As was noted with respect to the issues of overbreadth and vagueness, some of the retroactivity issues raised by Osborne are neither present in this case nor a basis to result in the setting aside of the conviction. For example, one such reason is the alleged retroactive application of the term minor to mean a person under 18 years of age for purposes of this statute. However, it is clear as noted with respect to vagueness that that common everyday meaning accorded to the term minor was not vague, and its specific construction by the Ohio Supreme Court to state that a minor is one under 18 years of age, does not render a retroactive application to Osborne.

Contrary to Osborne's assertion that the Ohio Supreme Court "rewrote" the statute, the Court did nothing other than authoritatively construe the statute to be consistent with New York v. Ferber. The Ohio Supreme Court did not add additional elements to the offense as the Appellant claims, but merely construed existing elements.

The Ohio Supreme Court did not insert the culpable mental state of recklessness, that provision was already in existence by virtue of Sections 2901.21 and 2901.22, Ohio Revised Code. Moreover, as noted by Justice Douglas in the Ohio Supreme Court Opinion, Osborne did not object to the jury instructions provided in this case regarding that issue, and his proposed jury instructions were completely silent on the element of scienter.

The narrowing and authoritative construction provided by the Ohio Supreme Court in this case is no different than many state courts were required to do with respect to obscenity statutes after this Court's decision in Miller v. California 413 U.S. 15 (1973). As noted above, when the Illinois Supreme Court did such an authoritative construction, this Court not only approved that construction but upheld the conviction in Ward v. Illinois, supra. See also Cox v. New Hampshire 312 U.S. 569 (1941) where, like this case, the Legislative intent was clear and the narrowing construction foreseeable, and the conviction was upheld by this Court when the authoritative construction post-dated the suspects conduct.

The cases cited by the Appellant with respect to this retroactivity issue all concern "pure speech" and not possessory offenses involving conduct. For that reason, there certainly are no retroactive application issues that warrant review by this Court due to the authoritative construction of the Ohio statute by its Supreme Court.

CONCLUSION

Based upon the foregoing law and argument, the State of Ohio respectfully submits that the Appellant Osborne has not shown that his child pornography conviction is repugnant to the United States Constitution, or any provision thereof, and this Court should either dismiss or summarily affirm this appeal.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

Ronald J. O'Brien
City Attorney
City Hall, 90 West Broad Street
Columbus, Ohio 43215
Phone: (614) 222-7385

Attorney for Appellee

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Appellee, State of Ohio was sent by regular U.S. Mail, postage prepaid, to S. Adele Shank, Ohio Public Defender Commission, 8 East Long St., Columbus, Ohio, 43266-0587 and John Quigley and David Goldberger, Ohio State University College of Law, Clinical Programs, 1659 N. High St., Columbus, Ohio, 43210, attorneys for Appellant this 12th day of December, 1988.

Ronald J. O'Brien
City Attorney

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Supreme Court, U.S.
FILED
DEC 30
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-5986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Apellant,

vs.

STATE OF OHIO,

Apellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO
REPLY TO MOTION TO DISMISS OR AFFIRM

S. ADELE SHANK
Ohio Public Defender Commission
8 E. Long Street - 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394
Counsel of Record

John Quigley
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

David Goldberger
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

COUNSEL FOR APPELLANT

Ronald J. O'Brien
Columbus City Attorney
City Hall
90 West Broad Street
Columbus, Ohio 43215
(614)222-7385

Counsel for Appellee

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Statement Of The Case

In a section of its Motion To Dismiss Or Affirm entitled "Facts", Appellee recites the allegations contained in the affidavit supporting the search warrant which permitted the search of Appellant Clyde Osborne's apartment. The bulk of the information cited by Appellee has nothing to do with this case or Clyde Osborne but rather refers to an investigation conducted in Florida. The trial judge ruled that all references to the Florida investigation be excluded at trial. (R. 43-44) As is evident from the record of this case, Mr. Osborne was prosecuted only for possession of the four photographs taken from his personal photo album.

Appellee next claims that these "photographs" were marked with the notation, "Tommy-13". (Appellee's Motion, p. 4) In fact only one photograph had this marking, State's Exhibit 1-D. (R. 53). This exhibit was not a polaroid photograph as were Exhibits 1-A through 1-C. (R. 55) This photograph depicted only part of a body from the chest to the knees. (R. 53) It was clearly established at trial that the notation on Exhibit 1-D did not reflect personal knowledge and was not made by Mr. Osborne. (R. 92-93) Although not referenced by exhibit number, it was clearly this partial photograph to which the Ohio Supreme Court referred when it said:

> The majority of the photographs speak for themselves...As possession of these photographs alone would support appellant's conviction , we need not consider whether the state proved the minority of the subject in the sole remaining photograph. (OP. p. 258)

Appellee also notes that a police officer recalled Mr. Osborne saying that the person in the photograph was fourteen years old. (Appellee's Motion p. 4) It was established at trial that Mr. Osborne had no personal knowledge of the person's age and that any comment he might have made regarding the model's age was hearsay. (R. 92) Further, neither the notation on Exhibit 1-D nor the officer's recollection was used as a basis of the Ohio Supreme Court decision. The court explicitly held that the minority of the photographic model was proved by the photographs themselves. (Op. p. 258)

THE Q. .TIONS PRESENTED ARE SUBSTANTIA.

Appellee in section I of its Motion refers this Court to Ohio Rev. Code Sec. 1339.31(K) for a definition of minor (Apppellee's Motion p. 7) That statute defines a minor, for purposes of certain commmercial transactions as one "who has not attained the age of twenty-one years." The statute was not used by the court in reaching its decision and has no bearing on this case.

Appellee claims, in section II of its Motion, that this Court's dismissal of State v. Jordan 665 P. 2d 1280 (Utah Sup. Ct. 1983) appeal dismissed sub nom, Fullmer v. Utah, Case No. 83-5320, 464 U.S. 910 (1983) is dispositive of the question of whether private possession of the materials at issue in this case is constitutionally protected. The statute in Jordan did not prohibit mere possession, but rather the production of child pornography.

Appellee also believes that the dismissal of People v. Geever, 522 N.E. 2d 1200 (Ill. Sup. Ct. 1988) appeal dismissed sub nom. Geever v. Illinois, Case No. 88-381 ___U.S.___; 57 L.W. 3312 (Nov. 1, 1988) is dispositive of this case. The statute in Geever required that possession be "knowing." As has been noted, the Ohio statute contained no element of scienter and has been construed to required only recklessness. (Op. p. 253) This Court has required scienter in order to punish for the production of child pornography. Ferber v. New York, 458, U.S. 747 (1982). It has never addressed the question of whether a lesser culpable mental state can result in punishment for mere possession in the privacy of one's home. The dismissal of Geever is not dispositive of this question.

In section VI of it's Motion, Appellee cites Ward v. Illinois, 431 U.S. 767 (1977) for the proposition that ex post facto application of a narrowing construction of an otherwise unconstitutional statute is consitutuional. (Appellee's Motion p. 13) The defendant in Ward was charged in October, 1971, for violation of a statute which had been authoritatively construed by the state supreme court in 1965. Ward v. Illinois, 431 U.S. at 770-773.

Appellee also refers this Court to Cox v. New Hampshire, 312 U.S. 569 (1941) for the proposition that the ex post facto application of a newly

construed statute is c: titutional where the construc..on is forseeable. (Appellee's Motion p. 13) In Cox convictions were affirmed for parading in the public-streets without a permit. The state court did not alter or interpret the elements of the offense of parading without a permit. The state court found the statute as written constitutional with the possible exception of one clause which was not at issue in the case. State v. Cox 16 A. 2d 508, 513. The issue of the forseeability of a particular construction and the ex post facto application of that construction was not addressed.

CONCLUSION

Appellee has raised no arguments other than those noted above which require any response. Mr. Osborne relies on the law and argument presented in his Jurisdictional Statement.

S. ADELE SHANK
Ohio Public Defender Commission
8 E. Long Street - 11th Floor
Columbus, Ohio 43266-0587

John Quigley
David Goldberger
The Ohio State University
College of Law
Clinical Programs
1659 N. High Street
Columbus, Ohio 43210

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Reply To Motion To Dismiss Or Affirm was served upon the offices of Ronald J. O'Brien, Columbus City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio, 43215, by regular U.S. mail on this 29th day of December, 1988.

S. Adele Shank

S. ADELE SHANK
Counsel for Appellant

88-5986

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Clyde Osborne, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? YES - Part Time

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Social Security $250.00 Mo. Title V Program
$268.00 Mo Senior Community Svc Employment Program
(Before Taxes) 1393 East Broad St. Suite 104
Columbus Ohio 43205.
Assigned Goodman Guild 2nd Avenue
Senior Diminlenter Litecam

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Social Security As Mentioned Above.

3. Do you own any cash or checking or savings account?

Yes

a. If the answer is yes, state the total value of the items owned. $75.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1981 SADARY - $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

_____

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clyde Osborne.
CLYDE OSBORNE

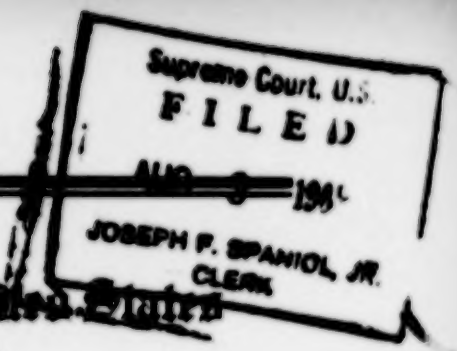
SUBSCRIBED AND SWORN To before me this 19th day of November, 1988.

Mary Carol Peirano
NOTARY

My Commission expires: MARY CAROL PEIRANO
Notary Public
My Commission Expires Dec. 30, 1992

No. 88-5986

(5)



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JOINT APPENDIX

RANDALL M. DANA
Ohio Public Defender

S. ADELE SHANK *
Assistant Ohio Public Defender

Ohio Public Defender
Commission
8 East Long Street—
11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

JOHN QUIGLEY
DAVID A. GOLDBERGER

Clinical Programs
College of Law
The Ohio State University
1659 North High Street
Columbus, Ohio 43210-1391
Counsel for Appellant

RONALD J. O'BRIEN *
City Attorney
90 West Broad Street
Columbus, Ohio 43215
(614) 645-6902
Counsel for Appellee

* Counsel of Record

APPEAL DOCKETED NOVEMBER 14, 1988
JURISDICTION NOTED JUNE 26, 1989

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RELEVANT DOCKET ENTRIES

Franklin County Municipal Court

July 22, 1985	Search warrant filed.
July 22, 1985	Complaint filed.
July 22, 1985	Not Guilty Plea entered and jury trial demanded.
September 24, 1985	Excerpts of Trial Transcript
September 25, 1985	Judgment Entry: Jury Verdict: Guilty, entered.

Tenth District Court of Appeals

June 10, 1986	Judgment entry affirming conviction filed.
June 10, 1986	Opinion affirming conviction filed.
September 25, 1986	Entry certifying the case to Supreme Court of Ohio due to a conflict between appellate districts.

Supreme Court of Ohio

July 6, 1988	Judgment entry affirming conviction filed.
July 6, 1988	Opinion affirming conviction filed.
August 31, 1988	Judgment Entry denying re-hearing filed.
October 12, 1988	Entry staying execution of sentence filed.

WARRANT TO SEARCH

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

To the Chief of Police of the City of Columbus, Ohio, Greetings:

WHEREAS, there has been filed with me an affidavit, a copy of which appears on the reverse side, these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime into premises known as 793 North Park Street, Apt. #3, Columbus, Ohio, 43215 and to execute a search of the said premises within 72 hours after the issuance of this warrant. The said premises being in the City of Columbus, Ohio, aforesaid, and there diligently search for (the said goods, chattels, or articles), to wit: Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Knous or Century 20th Studios or P.O. Box 3054, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios, and that you bring the same or any part thereof, found on such search, forthwith before me, or some other judge of this court having cognizance thereof, to be disposed of and dealt with according to law.

/s/ Marvin S. Romanoff
Judge
Franklin County Municipal Court
Columbus, Ohio
7/22/85 at 5:33 P.M.

SEARCH—WARRANT AFFIDAVIT

FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Det. James Phillips, CPD Child Porno Task Force who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Knoss or Century 20th Studies or P.O. Box 3054, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studies, are being kept in a certain building or room or location or known as 793 North Park Street, # 3 Apartment, Columbus, Ohio 43215 in said City of Columbus, Ohio, in violation of section 2907.321, 2907.322, 2907.323, O.R.C., as fruits, evidence or instruments.

The facts upon which such belief is based are as follows: on 7-22-85 the affiant spoke with U.S. Postal Inspector Paul M. Hartman, Cleveland, Ohio, who related the following to the affiant: On or about June 11, 1985 U.S. Postal Inspector P. M. Hartman, Cleveland, Ohio, initiated test correspondence with Century 20th Studios, P. O. Box 3054, Holiday, Florida 33590. In such correspondence Jack S. Smith, a principle in Century 20th Studios, offered Inspector Hartman various photographs depicting sexually explicit activity between adults and minors. In an Item of correspondence dated June 13, 1985, Smith wrote to Inspector Hartman:

The facts upon which such belief is based are as follows: one time I had an extensive collection of male/female action photographs, male/male action pictures, also, however, all such prints were sold out through an ad in the Advocate. I cannot have any reprints made in as much as the negatives are in possession of a friend of mine in Ohio. I had over 1,000 negatives of both hard and soft core photographs and I still retain ownership of some and, no doubt, will have them back within a short period of time. However, as suggested, please write to me and let me know what type photographs you are interested in. All models used are young—both boys and girls."

On or about July 15, 1985 Postal Inspector P. M. Hartman mailed a test letter, addressed to Box Holder, P.O. Box 3054, Holiday, Florida 33590, under cover to Postal Inspector Daniel Witouski. Such test letter contained an original U.S. Money Order issued in the amount of $14.00 pre-payment for photographs of minors engaged in sexually explicit conduct.

On or about July 17, 1985 Postal Inspector Daniel Witouski placed the above described test letter into P.O. Box 3054, Holiday, Florida and maintained visual surveillance of said P.O. Box. During the course of that surveillance, Inspector Witouski observed Jack S. Smith remove said test letter from said Post Office Box and proceed directly to Smith's residence.

Inspector Witouski and other officers maintained a continual surveillance of the Smith residence until approximately 1½ hours later when Smith emerged from the residence and entered his vehicle. Inspector Witouski continued to maintain the surveillance of the activities of Jack S. Smith and followed Smith directly to the Holiday Florida Post Office. Upon arrival at the Holiday Florida Post Office, Smith was observed by Inspector Witouski to deposit into the mails, two letters. At such

time that these observations were made, Inspector Witouski terminated the surveillance.

Inspector Witouski then made a visual observation of the mail receptacle into which Smith deposited the above described two letters. Such observation disclosed the presence of a letter bearing the return address of P.O. Box 3054, Holiday, Florida 33590 addressed to the confidential test name and address employed by Inspector P. M. Hartman in the conduct of this investigation. Inspector Witouski removed this said letter from the U.S. mails and having been so authorized by Inspector P. M. Hartman, opened said letter.

Upon opening said letter, Inspector Witouski found said letter to contain a two-page item of correspondence endorsed "Jack Smith" and 20 color photographs depicting minors below the age of 18 years engaged in sexually explicit conduct. Further searches of those photographs depicted sexual contact between minor females and an adult white male later identified by Inspector Witouski as Daniel S. Knous, also a principle in Century 20th Studios.

On or about July 19, 1985, Inspector Daniel Witouski and other officers executed a federal search warrant upon the premises of the Smith residence and arrested Jack S. Smith and Daniel S. Knous on federal charges arising from the use of the U.S. mails to distribute child pornography materials. During the conduct of the search Inspector Witouski discovered thousands of photographs depicting minors engaging in sexually explicit conduct as well as various records, papers and correspondence bearing upon the sale of such photographs.

Following his arrest, Jack S. Smith was advised of his Constitutional Rights per the Miranda decision and was questioned by Inspector Witouski as to the location whereat the photographic negatives, which were the source of such photos was secreted. Smith responded "they're with a friend of mine in Ohio named Clyde."

Similarly, Daniel S. Knous was advised of his Constitional Rights following his arrest and was also questioned by Inspector Witouski concerning the location whereat the photographic negatives from which such photographs had been produced were secreted. Knous related to Inspector Witouski that all such negatives were in possession of an associate of Smith's named Clyde Osborne, who resides in the Columbus, Ohio area.

During the conduct of the execution of said search warrant, Inspector Witouski located various mailing lists, one of such mailing lists including the name address of Clyde Osborne, 793 North Park Street, #3, Columbus, Ohio 43215.

Further, on the morning of 7-22-85, while reviewing evidence seized incident to the execution of a federal warrant at the Smith residence, Inspector Witouski located a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 dated 6-3-85. A review of the reverse of said cancelled check disclosed that the address of 793 North Park Street, # 3, Columbus, Ohio 43215, was inscribed thereon. Further, a review of said cancelled check disclosed that said check was cashed at Christie's Market, 680 North High Street, Columbus, Ohio telephone 224-1508.

/s/ Det. James A. Phillips 717
Police officer

Sworn to before me and subcribed in my presence this 22nd day July, A.D. 1985,

/s/ Marvin S. Romanoff
Judge
Franklin County Municipal Court
Columbus, Ohio
7-22-85
5:25 p.m.

COMPLAINT

CASE # 14333

FRANKLIN COUNTY MUNICIPAL COURT

STATE OF OHIO

vs.

CLYDE J. OSBORNE
793 N. Park St. Columbus, Ohio
M/W 6'00" 220# Gry/Brn 3/8/24

Charge Possession of Child Pornography

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

Complainant being duly sworn states that Clyde J. Osborne at Franklin County Ohio, on or about the 22nd day of July 1985 did possess material that shows a minor who is not the person's child or ward in a state of nudity, to wit: possessed Polaroid photographs which depicted a minor male child in a state of nudity in violation of O. R. C. # 2907.323 A-3 m-1.

Complainant Det. James A. Phillips, C.P.D.

Sworn to and subscribed before me, this 22 day of July A.D., 1985

TED HYSELL
Clerk of the Franklin County
Municipal Court

By /s/ [Illegible], Deputy

FRANKLIN COUNTY MUNICIPAL COURT

September 24, 1985

(Title Omitted in Printing)

EXCERPTS OF TRIAL TRANSCRIPT

Filed November 19, 1985

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Direct Examination by Mr. O'Brien

• • • •

[51] Q. What level was the defendant's apartment on? ground floor? upper level?

A. It was an upper level, second floor.

Q. What area of the residence did you search?

A. The front room, sir.

Q. Detective Munsch, can you tell me what area of the apartment he searched?

A. The second room back, or the middle room, I guess you would call it.

Q. Did Detective Munsch provide to you an item during the course of that search?

A. Yes, sir, he did.

Q. Okay. Referring to an item that's been marked for identification purposes as State's Exhibit 1, is that item familiar to you?

A. Yes, sir. That's the item that he gave to me.

Q. Okay. Would you hold that up so the jury can seen what you're talking about?

A. (Witness complied.)

Q. And is that the photo album that Detective Munsch provided to you on July 22 of this year?

[52] A. Yes, sir, it is.

Q. Did you go through that photo album when Detective Munsch gave it to you?

A. Yes, sir, I did.

Q. Okay. Referring through that photo album, there are a group of four photographs partway through that album. I want you to look at those four photographs and tell me if you observed them on July 22 when Detective Munsch brought this album to you at the defendant's home.

A. Yes, sir, we did. As we went through, we observed these, yes.

Q. And they are marked in that photo album as State's Exhibits 1A, 1B, 1C, and 1D; is that correct?

A. Yes.

Q. And are those the same photographs—

A. Yes.

Q. —1A through D, that were in that photo album that Detective Munsch provided to you on July 22?

A. Yes, sir, they are.

Q. And upon observing those photographs, did you have a conversation with the defendant, Clyde Osborne, about them?

A. Yes, I did.

Q. Did you show him those four photographs that are in that book?

[53] A. Yes, sir. And we questioned him as to the name of the individual in the photographs.

Q. Are there any markings on any of those four photographs on those pages?

A. There is markings on the one photograph, State's Exhibit 1D, on the back of the photograph.

Q. And what marking is that?

A. The marking "Tommy-13."

Q. What's depicted in that State's Exhibit 1D?

A. This is a male, obvious male nude photograph from approximately the breast down, from the breast down to about the knees.

Q. Okay. Referring to State's Exhibit 1A, the photograph there, will you tell us what's shown in that?

A. This is a full-length shot of a young male, nude, with an erection.

Q. And is he standing? sitting?

A. He's laying—

Q. MS. MALLORY: Excuse me, Your Honor, but I'm going to object to this line of questioning. If the picture is admitted, the jurors are going to see the picture. I don't think they need a description of what each picture is.

THE COURT: And I assume your objection is on the grounds that the photographs will speak for themselves.

[54] MS. MALLORY: Yes, Your Honor.

THE COURT: On that grounds, I will sustain the objection.

MR. O'BRIEN: Thank you, Your Honor.

Q. Those four photos are the actual photos that were in the defendant's home that day; is that correct?

A. Yes, sir, uh-huh.

Q. Now, did you ask Mr. Osborne who that young man was in Exhibits 1A through C?

A. I asked him if he had the name of the young boy.

Q. And what did he say?

A. He said, no, he didn't know his name.

Q. Did the defendant tell you where he got those photographs?

A. He said that these photographs were taken and came from another state.

Q. What other state?

A. Florida.

Q. Did he say how long he had had those photographs?

A. For some time.

Q. Did you question Mr. Osborne as to his knowledge about the age of that young man in—

A. Yes, I did. And Mr. Osborne's reply or answer was, at the time the photograph was taken, the boy was 14.

Q. Does it appear to you that it's the same series [55] or group of photos, 1A through C, as distinguished from 1D?

A. Mr. O'Brien, no, it would be hard for me to determine.

Q. Are 1A through C Polaroid photographs?

A. Yes.

Q. Is 1D a Polaroid?

A. No.

Q. So there is that one difference?

A. Yes.

Q. There are no markings on 1A through C?

A. No.

Q. Did you have other conversation with Mr. Osborne about that—those group of four photographs?

A. No, no extended conversation. As I recall, you had some conversation with him.

Upon me asking him if he had this boy's name or who this boy was, and he said, no, he didn't know his name, upon him giving me his age, that was pretty much the extent of it until we went to headquarters.

Q. Now, before you started asking these questions, did you advise him of his rights?

A. Yes, sir, I did.

Q. Did you have conversation with the defendant about any children that he might have?

A. Yes, we did. Questioned him if he had any [56] children. He indicated he had a foster son.

Q. Did he state that that young man in that photograph was his son or foster son?

A. No. He said his foster son was forty some years old at this time.

Q. Did he at any time indicate that that young boy in that photograph was his ward when the photos were taken or even on July 22?

A. No, he gave no indication at all of that.

Q. And he did not know the young man's name?

A. No.

Q. Did you ask him if he himself had taken that photograph?

A. Yes.

Q. And what was his response?
A. He said that he did not.
Q. But he had obtained them from Florida, did you say?
A. Yes.
Q. Now, since July 22 until today when you brought that photo album into court, where has that item been?
A. This album, the whole album, has been in my custody.
Q. And you brought it today to court with you?
A. Yes, sir.
[57] Q. Okay. The other contents in that photo album, can you generally describe them for the jury?
A. Generally describing the other photographs obtained in the album are primarily all males of various ages, mostly all nude or—yes, mostly all nude. That's basically what's in the album.
Q. You indicated that you spoke with the defendant at police headquarters later that evening?
A. Yes. We did not—Just brief conversation. We didn't even—As I recall, we didn't get into an interrogation at all. We felt that our conversation at his residence—And we advised him what we were going to do with the photographs, and we filed the affidavit in headquarters.
Q. Now, did the defendant make any statements as to ownership of that photo album?
A. He indicated it was his photo album, yes. And while we were at the residence, he indicated, upon questioned, if he had taken any of the photographs contained therein, and he said he had taken a few, yes.
Q. Okay. There on the witness table, also, is an item marked for purposes of identification as State's Exhibit No. 2. Can you tell me what that is?
A. Yes. This is a photocopy of an envelope and letter that was seized while executing the search warrant.

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Cross-Examination by Ms. Mallory:

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[62] Q. But you say he gave you an age of 14?
A. Yes.
Q. But yet he didn't know the person in the photograph?
A. Yes, ma'am. He indicated that the age was 14 at the time the photo was taken, were his exact words.
Q. Do you know how he would know that—
A. No, I have no idea.
Q. —since he doesn't even know who the person in the photograph was?
Since you weren't present when the photograph was taken and don't know anything about the circumstances surrounding it, how do you know it's not been touched up by some photography technique or a composite photo, or something?
A. I would have no knowledge if it was or it wasn't, ma'am. I'm not an expert in that field. I could tell that it was a Polaroid photograph and that was the extent of it.
Q. Okay. So you can't tell whether it is a real picture of a nude person or a composite or some other way?
A. I can tell it's a Polaroid picture, and I've seen enough to know if one has been touched up or not.

• • • •

Re-Direct Examination by Mr. O'Brien:

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[64] THE COURT: Would you wait until the witness gets through answering the question before you start asking the next one, because of this young lady?
MR. O'BRIEN: Yes, Your Honor.
Q. Have you seen a mannequin before, Detective Phillips?
A. Yes, I have.

Q. Does that look like a mannequin in any of those four photos?

A. No, sir.

Q. Now, did Mr. Osborne tell you in what state those pictures were taken?

A. I don't understand your question.

Q. Did he tell you where those pictures were taken or how he came into possession of them?

A. When I questioned Mr. Osborne, I asked him if he knew this boy's name. He said, "No, I don't know his name." I said, "Do you know his age?" He said, "He's 14 at the time the picture was taken."

Q. Did he say where the picture was taken?

A. He said the picture was taken in Florida.

Q. Did he say what kind of location in Florida?

A. He did not elaborate on that, no, sir.

Q. But he was aware it was taken in Florida?

• • • •

Re-Cross Examination by Ms. Mallory:

• • • •

[66] Q. Directing your attention back to July 22 of this year, did you have an occasion to go to 793 North Park Street here in Columbus?

A. Yes, I did.

Q. With Detective James Phillips?

A. Yes.

Q. Did you have a search warrant for that premises?

A. Yes, we did.

Q. Did you search that premises?

A. Yes, we did.

Q. What area of the residence did you search?

A. I searched the bedroom, which is adjoining the living room.

Q. Okay. Making reference to this sketch on that board, could you point to which room you were searching?

A. Yes. This room right here. (Indicated.)

Q. Okay. Will you indicate to us whether you found anything in that room?

A. Yes. In the desk, which was located at the foot of the bed, in one of the desk drawers I found a photo album. I also found correspondence and miscellaneous paperwork, including bills, with the name of Clyde Osborne on them on top of the desk.

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Direct Examination by Ms. Bennett:

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[80] Q. Okay. Are you married?

A. No, ma'am.

Q. Okay. I realize that this could be a little difficult to talk about, and we have talked about it throughout this trial here, but what is the reason—why are you not married at the present time?

A. Well, I never found anybody I considered right for me.

Q. What is your sexual preference at the present time?

A. Well, really I don't have any. I been—

Q. Could you explain that a little further?

A. Well, in my younger days, I was active gay.

Q. When you say younger, what do you mean by that?

A. Oh, around 40, 45, someplace along there.

Q. Okay.

A. And my preference at this time is to drift. It could go either way.

• • • •

Direct Examination by Ms. Bennett:

• • • •

[87] Q. How long ago did you put it in the album?

A. Oh, it's been well over three years ago.

Q. And when was the last time that you looked at this photograph album?

A. Oh, I think about six months ago, around the first of January, maybe in December.

Q. Did you remember that these photographs were even in the album?

A. No.

Q. Did you know that it was illegal to possess those photographs?

A. No, ma'am, I did not.

MR. O'BRIEN: Object and move to strike.

THE COURT: Sustained. His knowledge or lack of it is irrelevant.

MR. O'BRIEN: Thank you, Your Honor.

BY MS. BENNETT:

Q. Mr. Osborne, do you have a relationship with a younger man?

A. No.

Q. Have you had a sexual relationship with a younger man?

A. Years ago, yes.

Q. How old were you then?

[88] A. Oh, I suppose I was around 20, 25.

Q. Okay. Since you've—In the last, say, ten years, have you had a relationship with a younger man?

A. No.

Q. Thank you. All right. Going back to those four pictures, do you know how old that young man is?

A. Well, I was told he was 14 at the time the pictures was taken.

Q. But did you have any personal knowledge—

A. No.

Q. —as to the age of that?

A. No, ma'am.

MS. BENNETT: That's all I have for right now.

THE COURT: Cross-examine.

MR. O'BRIEN: Thank you, Your Honor.

* * * *

Cross-Examination by Mr. O'Brien:

* * * *

[88] Q. Mr. Osborne, who was it that gave you that group of photographs?

A. Well, it was a Jack Smith from Florida.

Q. Okay. Is that the same Jack Smith whose name is—

A. Right, right.

Q.—on that envelope that State's Exhibit 2 [89] here in the courtroom?

A. Right, right.

Q. Where does Mr. Smith live now?

A. Tarpon Springs, Florida; was Tarpon Springs, Florida.

Q. He gave that to you personally when he was up here in Columbus?

A. Right; among the others, yes.

Q. Did he give you others when he gave you those?

A. I mean the other three pictures.

Q. Okay. Did he give you others besides that group when he gave you that group?

A. Well, there were some, but I never kept them. I got rid of them.

Q. But you kept the ones that were in the album?

A. Yeah, 'cause he asked me to.

Q. He asked you to keep them?

A. (Witness nods.)

Q. Did he say why he was giving those photos to you?

A. Well, he said for safekeeping.

Q. For safekeeping. Did he tell you who the boy was in the photographs?

A. No.

Q. Did he say that he had taken the photos?

[90] A. I think he said that he had taken them, yes.

Q. That would be Jack Smith?

A. Right.

MS. MALLORY: I'm going to object and move to strike that as hearsay, as the defendant does not have any knowledge of who took the photos.

THE COURT: He is stating as to what he had been told.

MS. MALLORY: Well, that's hearsay.

THE COURT: I will overrule the objection.

BY MR. O'BRIEN:

Q. Make sure I understand correctly. Jack Smith told you he took these photographs, at least the three Polaroids?

A. Right.

Q. Who is the boy in it? He didn't tell you that?

A. He didn't tell me that, no.

Q. Did he tell you where they were taken?

A. I assume someplace in Florida. Of course, they could have been taken anyplace. He used to travel as a representative of the circuses, advance agent, you know, so he used to travel all up and down, coast to coast and north to south. I don't really know—He couldn't really explain where they were taken.

Q. Did he tell you they were taken in a motel?

[91] A. No.

Q. You kept these, then, after he gave them to you and mounted them in that album; correct?

A. Right.

Q. Back on July 22, were you living by yourself or with someone?

A. No, I had a roommate.

Q. Who was that?

A. Dale Rorabaugh.

THE COURT: Pardon me. Could you spell that name for the court reporter, please?

THE WITNESS: Dale, you'll have to spell it. R-o-r-a-b- —

MR. RORABAUGH: A-u-g-h.

THE WITNESS: —a-u-g-h.

Q. And is Mr. Rorabaugh living with you there on 2nd now?

A. No, ma'am—No, sir.

Q. Now, this photo album that we've talked about here in the courtroom, that is your photo album?

A. That is my photo album, right.

Q. And those four photographs that we're talking about, those are your photos?

A. Well, I don't consider them mine, no.

Q. Okay. You were keeping them for Jack?

[92] A. I was just keeping them for Jack, right.

Q. Smith?

A. Right.

Q. And you had been keeping them for Jack Smith for how long? three to four years?

A. Yeah, about that.

Q. Has Jack ever asked you for them back?

A. No.

Q. Have you talked to Jack during this four or five years?

A. I've written him. I haven't talked to him. Well, I'll take that back. I talked to him about four years ago on the telephone once.

Q. And he's never asked for them back?

A. He's never asked for them back, no.

Q. Now, referring to an item that's marked as State's Exhibit 1D, that also was in the album, wasn't it?

A. Right.

Q. Did Jack give you this photograph, Exhibit 1D?

A. Right.

Q. Is there anything written on the back of that?

A. Yeah, Tommy-13.

Q. Is that your handwriting?

A. No.

Q. Whose handwriting is that?

[93] A. I assume it's Jack's. I won't swear to it.

Q. Was that handwriting on it when Jack gave this photo to you?

A. Right.

Q. Did he give this photo to you at the same time he gave you the other three?

A. Right.

Q. Now, looking at State's Exhibit 1A, can you tell the jury what's in that photo?

MS. MALLORY: I'm going to object to this. Haven't we talked about the fact that the jury will see the photo and don't need to be told what's in it?

THE COURT: Overruled. This is cross-examination.

A. Well, it's a picture of a body with a hard-on, if you want to get technical about it.

Q. Just to be clear, that is a boy; it's not a mannequin?

A. Well, I don't know. It's hard to say. Looks like a boy to me.

Q. Okay. And when you say he has a hard-on, he has an erect penis?

A. Right, right.

Q. Now, what's he holding there in his left hand? Can you tell?

A. Oh, I don't know. It's hard to say. It could [94] be one of them things you use in the kitchen. It's hard to say. I couldn't tell you what it is.

Q. Okay. On Exhibit 1A, you can't tell what he's holding in his hand?

A. No. Something electrical; got an electric cord on it.

Q. Referring to State's Exhibit 1C, is that the same boy?

A. Right.

Q. Is he holding anything in his right hand?

A. Yeah.

Q. What is that?

A. It's one of them dilados [sic], or whatever they call them.

Q. What are they used for?

MS. MALLORY: I'm going to object to this. I see no relevance to this kind of questioning. The jury's going to get to look at the pictures.

THE COURT: Overruled.

MS. MALLORY: I'm going to object to Clyde being asked what that item is used for.

THE COURT: Overruled; if he knows.

BY MR. O'BRIEN:

Q. Clyde, can you tell what that—

A. Well, really, I've never used the things. I [95] don't know what they are used for.

Q. Well, what's the boy doing with it in that photograph?

A. Looks like he might have it up his—Of course, he could be just holding it there.

Q. What does he appear to be doing with it?

MS. MALLORY: I'm going to object to this again. The jury is going to see the pictures. I don't think we need to have a graphic description that's going to embarrass Mr. Osborne on the stand.

THE COURT: Overruled. You may answer, sir.

Q. Judge Pearson indicated you can answer the last question, Mr. Osborne, which is, what is the boy doing with that dildo in State's Exhibit 1C?

A. I said it appears—You can't tell for sure actually. You don't know whether it's penetration or not. He's just holding it up to his backside.

Q. Are his legs spread, I take it?

A. Yeah, his legs spread. But you can't tell from the picture whether there's any penetration. He could be holding it out two or three inches from himself.

Q. In that same photo, State's Exhibit 1C, is that electrical device you talked about earlier—can you see that in that picture?

A. Yeah, there's something laying there at the [96] side. Looks like a sander.

Q. Does it look like the same thing that's in Exhibit 1A?

A. Yeah, I guess it is.

Q. It does appear to be the same electrical device you referred to?

A. Yeah, right.

Q. So to make sure I understand you, Mr. Osborne, those were being kept, held, possessed by you at 793 Park Street back on July 22, those four photographs on that witness table?

A. Right, right.

Q. You did live at that residence?

A. Right.

Q. And that residence is here in Columbus; correct?

A. Right.

Q. That young boy is not your son, is he?

A. No.

Q. That young boy is not your ward, is he?

A. No.

MR. O'BRIEN: I have no other questions.

THE COURT: Any redirect?

MS. BENNETT: No further questions.

THE COURT: You may step down.

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FRANKLIN COUNTY MUNICIPAL COURT

(Title Omitted in Printing)

09-25-85

JUDGMENT ENTRY

JURY VERDICT: GUILTY 6 MONTHS IN FCCC $100 FINE PLUS COSTS NO FINDING OF ABILITY TO PAY FINES. NO 2 FOR 1 SUSPEND 10 DAYS FOR TIME SERVED. IMMEDIATE ENFORCEMENT APPEAL BOND $5000 CASH OR SURETY JUDGE PEARSON

THE ABOVE FINAL APPEALABLE ORDER FILED 09-25-85 (DATE) WITH CLERK OF COURTS—FRANKLIN COUNTY MUNICIPAL COURT.

TED HYSELL
Clerk

By: KAPEL
Special Deputy Clerk

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 85AP-945
(Regular Calendar)

STATE OF OHIO,
Plaintiff-Appellee,
v.

CLYDE OSBORNE,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

Filed June 10, 1986

For the reasons stated in the opinion of this court rendered herein on June 10, 1986, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

REILLY, NORRIS & LYNCH, JJ.

By /s/ Archer E. Reilly
JUDGE ARCHER E. REILLY

LYNCH, J., Retired, of the Seventh Appellate assigned to active duty under authority of Section 6(C), Article IV, Constitution.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

(Title Omitted in Printing)

OPINION

Rendered on June 10, 1986

Appeal from the Franklin County Municipal Court.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS and MR. DAVID E. TINGLEY, for appellee.

MR. RICHARD CURTNER and MR. GERALD A. MOORE, for appellant.

REILLY, J.

This is an appeal from a conviction in the Franklin County Municipal Court for one count of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(3).

Columbus police officers conducted a search of defendant's home pursuant to a search warrant issued by a judge of the Franklin County Municipal Court on July 22, 1985. They seized a photo album during the search that contained four photos, which were the subject of the conviction involving this appeal.

Several motions were filed prior to trial including a motion to dismiss, a motion to suppress the photographs,

and a motion for particular jury instructions. These motions were overruled. The cause proceeded to trial and a jury returned a verdict of guilty.

Defendant has timely appealed and advances the following assignments of error:

"I. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 11 and 16, of the Ohio Constitution, because this statute is unconstitutionally vague and overbroad on its face.

"II. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 11 and 16, of the Ohio Constitution, as applied to appellant because it punishes mere private possession of minor-nudity material.

"III. The trial court erred in overruling appellant's motion to suppress evidence obtained on the basis of the search warrant because the warrant's affidavit was facially defective, violating appellant's rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 14, of the Ohio Constitution.

"IV. The trial court erred to the prejudice of the appellant by admitting into evidence, without authority to do so, irreelvant, unauthenticated photographs for the purpose of proving the age of the person depicted, thus denying the appellant a fair trial and due process of law as guaranteed by Article I, Section 16, of the Ohio Constitution and the Fourteenth Amendment of the U.S. Constitution.

"V. The trial court erred in overruling appellant's motion for a mistrial on the grounds that testimony volunteered by a police officer was in violation of a motion *in limine* ordering exclusion of evidence relating to postal inspectors, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VI. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of the state's evidence, violating appellant's rights under the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"VII. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of all the evidence because insufficient evidence of probative value was submitted as to several elements of the crime and because a conviction is against the manifest weight of the evidence, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VIII. The trial court's refusal to charge the jury with appellant's requested special jury instructions denied appellant a fair trial in violation of the due process clauses of the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"IX. Appellant's conviction for mere possession of 'minor-nudity' material, where appellant came into possession of such material years before O.R.C. 2907.323(A)(3) was enacted and where appellant's conduct is entirely passive, violates appellant's rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

The first and second assignments of error are considered together, as they are interrelated. Defendant contends that R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad on its face and violates his right to privacy. R.C. 2907.323 provides, in pertinent part:

> "(A) No person shall do any of the following:
>
> "• • •
>
> "(3) Possess or view any material • • • that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> "(a) The material • • • is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material • • •.
>
> "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material • • • is used • • •."

Defendant's challenges to the constitutionality of the statute were previously addressed by this court in two recent decisions: *State* v. *Modeen* (April 17, 1986), No. 85AP-907, unreported (1986 Opinions 831); and *State* v. *Sandera* (April 24, 1986), No. 85AP-594, unreported (1986 Opinions 942).

In *Modeen*, this court held that *New York* v. *Ferber* (1982), 458 U.S. 747, supports the determination that the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography. This court also construed "state of nudity"

to only include lewd exhibitions of the genitals, thus defeating any overbreadth contention. In *Sandera*, we found that by considering the entire statute, it was apparent that the legislature had defined nudity-oriented material to apply to the depiction of nudity which is devoid of any legitimate purpose. The photographs involved in this case show a young boy in a state of nudity, lewdly exhibiting his genitals. The statute proscribes possession of such photographs.

Thus, defendant's first and second assignment of error are not well-taken.

Defendant contends in the third assignment of error that the court erred by overruling his motion to suppress evidence obtained on the basis of the search warrant. Defendant maintains that the warrant's affidavit is facially defective because it lacks any indication of when defendant came into possession of the photographs. Moreover, defendant claims that the affidavit contains hearsay which is not credible because it is exculpatory in nature.

The affidavit was signed by Detective James Phillips, who based his testimony on information he received from a Cleveland Postal Inspector, who had in turn received his information from a Florida Postal Inspector. The affidavit indicated that surveillance of an individual in Florida had resulted in the seizure of child pornography there from Jack Smith and another individual, Dan Knous, who had been arrested in Florida. Both men implicated the defendant as possessing negatives of child pornography. During a search of Smith's residence, pursuant to a federal search warrant, a mailing list was seized containing defendant's name and address. Further, a cancelled check made to the order of defendant and dated June 3, 1985 was also seized as part of the search.

Crim. R. 41(C) provides:

> "• • • The finding of probable cause may be based upon hearsay in whole or in part, provided there is

> a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. * * *"

Defendant asserts that the hearsay statements of Smith and Knous were not reliable because they were exculpatory in nature. The state contends these statements were reliable as they were against penal interests. It is noteworthy, however, that such statements were not the only evidence before the court. There was also the mailing list with defendant's name and a cancelled check. This other evidence, together with the statements of Smith and Knous was sufficient to establish probable cause when the totality of the circumstances test is applied as required by *Illinois* v. *Gates* (1983), 462 U.S. 213.

Defendant further contends that the search warrant affidavit is defective because it does not state when defendant came into possession of the negatives. Hence, there was no probable cause to believe defendant was still in possession at the time the affiant prepared the affidavit.

The facts in the affidavit indicate that Smith and Knous were arrested on July 19, 1985, three days before the warrant was issued. At that time, both men stated that defendant had the negatives. Although it was not established when defendant possessed them, there were sufficient facts to justify the issuance of the warrant. In *State* v. *Marko* (1973), 36 Ohio App. 2d 114, this court held that a search warrant is valid and the evidence on which it is based is not stale if law enforcement officers applied for the warrant as soon as they became aware of the location of the evidence. *Marko* involved a possessory crime which was held to be a continuing offense. This same rationale applies to the facts in the instant case.

Hence, defendant's third assignment of error is not well-taken.

Defendant maintains in the fourth assignment of error, that the court erred in admitting into evidence four photographs. Defendant contends these photographs were irrelevant and unauthenticated as required by Evid. R. 901.

This allegation is not well-taken. The photographs were relevant since defendant was charged with possessing material that showed a minor in a state of nudity. Possessing the photographs was, consequently, the substance of the charge, and the photographs were definitely relevant evidence. As to the authentication issue, defendant seems to contend that these photographs had to be authenticated by the photographer before they were admissible. Such a requirement would unduly limit the effect of R.C. 2907.323(A)(3). Detective Phillips testified that the photographs were found in defendant's home. Defendant also testified that the photographs were given to him by a friend, that he arranged them in a photo album and that the album was kept in his residence. This was sufficient identification to render the photographs admissible.

Defendant's fourth assignment of error is not well-taken.

Defendant contends in his fifth assignment of error that the court erred in failing to declare a mistrial when a witness testified in violation of a motion *in limine*. The court granted a motion *in limine* before trial excluding any evidence as to the basis for the search warrant. Defense counsel sought to exclude any evidence of additional federal charges regarding misuse of the mail. During the testimony of Detective Phillips, the officer was asked whether in executing the search warrant there were several officers present. Detective Phillips responded that there were three other officers and two postal inspectors. Following defense counsel's motion for a mistrial, the court, in denying the motion, found that the motion *in limine* barred evidence that the police had received any

information from the postal inspectors for the search warrant. The court further found that Detective Phillips' answer was not in direct violation of the order and was not prejudicial to defendant.

The trial court's ruling was correct. As stated in *State* v. *Hymore* (1967), 9 Ohio St. 2d 122, at 128:

> "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere."

Considering the trial court's proper finding that this testimony was not in direct violation of the motion *in limine*, and that defendant was not materially prejudiced by this evidence, there was no abuse of discretion.

Defendant's fifth assignment of error is also not well-taken.

In the sixth and seventh assignments of error, defendant contends that the court erred in overruling his Crim. R. 29(A) motion for acquittal for several reasons. Defendant first claims that there was no evidence that the material he possessed showed a "*minor*" as required by R.C. 2907.323. Nevertheless, Detective Phillips testified that the defendant told him he thought the boy in the photograph was fourteen years old when the pictures were taken. Moreover, the photographs speak for themselves as they manifestly show a young boy. The defendant further contends that the state did not establish that the boy in the photographs was not the defendant's child or ward. Defendant himself testified that the boy was not in either category.

Finally, defendant maintains that the state failed to present any evidence that the exceptions in R.C. 2907.323 (A)(3) did not apply to defendant. A review of the transcript reveals that the state presented sufficient evi-

dence to establish a *prima facie* case against defendant; that he possessed a depiction of a child in a state of nudity and that the depiction involved lewdness, eroticism, lechery, salaciousness, voyeurism or other exploitive, unwholesome motivations. See *Sandera, supra.* If the defendant wished to contravene that *prima facie* case, it was incumbent upon him to introduce evidence that the depiction served one of the legitimate purposes set out in R.C. 2907.323(A)(3)(a) or (b).

Whereupon, defendant's sixth and seventh assignments of error are not well-taken.

Defendant maintains, in the eighth assignment of error, that the court erred in refusing to give requested instructions to the jury. Defendant requested the court to instruct the jury that a minor was a person not over fifteen years of age. Defendant cites R.C. 2907.04, 2907.21, and 2907.22 in support of his contention. R.C. 2907.04 defines corruption of a minor, whereas, R.C. 2907.21 and 2907.22 relate to prostitution. Although these statutes increase the penalty for conduct with minors less than sixteen years of age, the committee comments following thereafter explain that the prohibited conduct is considered more harmful to persons in early adolescence. They do not permit similar conduct with those over sixteen years of age. Thus, the term "minor" takes on an atypical meaning for purposes of those statutes, as it is only meant to refer to those under sixteen years of age.

The term "minor" is not specifically defined in the criminal code. Nonetheless, R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. * * *" The common and ordinary meaning of the term "minor" is a person under the age of eighteen years. This is the definition the court gave to the term "minor," which was a correct definition. Further there

was sufficient evidence for the jury to find that the boy involved in these photographs was not over fourteen years old.

Defendant also requested the court to read the entire statute in its charge to the jury. The court refused in the absence of evidence on any of the exceptions. Although it is perhaps a better practice to read the statute and exceptions together, considering this court's holding in *Sandera*, *supra*, there was no prejudicial error in this case by the court's refusal to do so. There was no evidence presented requiring the jury to determine whether one of the exceptions applied to defendant. Furthermore, the photographs plainly met the definition of lewd exhibition of genitals.

Defendant's eighth assignment of error is not well-taken.

In the final assignment of error, defendant asserts that his conviction violates due process because he came into possession of the prohibited material prior to the effective date of the statute. As noted above, a possessory offense is a continuing offense. Defendant was charged with possessing the materials on July 22, 1985. The evidence presented at trial was sufficient for the jury to find defendant guilty of the proscribed conduct. We find no denial of due process in this case.

Defendant's ninth assignment of error is not well-taken.

For the foregoing reasons, defendant's assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

NORRIS and LYNCH, JJ., concur.

LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Constitution, in the Tenth Appellate District.

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM

To wit: July 6, 1988

Case No. 86-1728

STATE OF OHIO,

Appellee,

v.

CLYDE OSBORNE,

Appellant.

JUDGMENT ENTRY

Certified by the Court of Appeals

This cause, here on certification by the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Appeals for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 85AP945)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 6th day of July, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

THE SUPREME COURT OF OHIO

(Title Omitted in Printing)

Criminal law—Prohibition of possession or viewing of material or performance of minor in state of nudity—R.C. 2907.323(A)(3) is constitutional—"Minor," construed—Culpable mental state of recklessness required—"Proper purposes" exceptions are affirmative defenses.

O.Jur. 3d Criminal Law § 1860, 1877.6

1. R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.
2. The term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.
3. Recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3).
4. The "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2).

(Nos. 86-1532 and 86-1728

Submitted May 3, 1988

Decided July 6, 1988.)

CERTIFIED by the Court of Appeals for Franklin County, Nos. 85AP-1033 and 85AP-945.

In case No. 86-1532, Columbus police officers applied for a warrant to search the residence of defendant-appellant, Denis Young. The facts contained in the affidavit for the warrant were provided to police by two male minors who had been arrested on separate occasions for being a runaway and for male prostitution, respectively. Both informants reported that they had been picked up by Young and taken to Young's home, that Young had taken nude photographs of them, and that they had engaged in sexual acts with Young. Further, both informants reported that they had observed photographs in Young's house of nude minors or of minors engaged in sexual activity.

The warrant was executed on March 21, 1985. Various items were seized, including four photographs of one of the informants. Young was subsequently charged with possession of material depicting a minor in a state of nudity in violation of R.C. 2907.323(A)(3).

Young filed a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional. He also moved to suppress the evidence seized pursuant to the search, alleging that the search warrant was issued without probable cause. Both motions were overruled, the motion to suppress after a hearing. Young thereafter entered a plea of no contest and was found guilty of the charge set forth in the indictment. Upon appeal, the court of appeals affirmed Young's conviction, upholding the constitutionality of R.C. 2907.323(A)(3).

In case 86-1728, Columbus police secured a warrant to search the residence of defendant-appellant, Clyde J. Osborne. The warrant was issued pursuant to an affidavit sworn by Detective James A. Phillips of the Columbus Police Department. The information recited in the affidavit was based on a conversation between Phillips and an Ohio postal inspector. The inspector informed Phillips that a Florida postal inspector had arrested two

persons in that state who, during interrogation, implicated Osborne as having photographic negatives of child pornography in his possession.

The warrant was executed on July 22, 1985, resulting in the seizure of, *inter alia*, photographs of nude male minors. Osborne was subsequently charged with a violation of R.C. 2907.323(A)(3).

Osborne filed various pretrial motions, including a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional, and a motion to suppress the evidence seized during the search. These motions were overruled and, after a jury trial, appellant was found guilty as charged.

Upon appeal, the court of appeals upheld the constitutionality of R.C. 2907.323(A)(3) and affirmed Osborne's conviction.

By separate entries, the appellate court, finding its judgments in case Nos. 86-1532 and 86-1728 to be in conflict with the judgment of the Court of Appeals for Hamilton County in *State* v. *Meadows* (Dec. 18, 1985), No. C-850091, unreported, certified the record of each case to this court for review and final determination.

Ronald J. O'Brien, city attorney, for appellee.

Andrea R. Yagoda, for appellant in case No. 86-1532.

Richard Curtner, for appellant in case No. 86-1728.

S. Adele Shank, for appellants.

DOUGLAS, J. The question certified to this court in the two cases before us today is whether the state, consistent with the First Amendment to the United States Constitution, may outlaw the private possession of child pornography. This question has since been answered in the affirmative in *State* v. *Meadows* (1986), 28 Ohio St. 3d 43, 28 OBR 146, 503 N.E. 2d 697. The syllabus in *Meadows* reads:

"R.C. 2907.322(A)(5), which prohibits the knowing possession or control of material which shows a minor

participating or engaging in sexual activity, masturbation, or bestiality, does not violate the First Amendment to the United States Constitution, as made applicable to the states by reason of the Fourteenth Amendment. (*Stanley* v. *Georgia* [1969], 394 U.S. 557, and *New York* v. *Ferber* [1982], 458 U.S. 747, construed, harmonized and followed.)"

Our ruling in *Meadows* concerned the constitutionality of R.C. 2907.322(A)(5), while the cases before us today involve a related statute, R.C. 2907.323(A)(3). However, shortly after *Meadows* was decided, this court issued judgment entries in two cases involving R.C. 2907.-323(A)(3), both of which were resolved solely on the authority of *Meadows*. *State* v. *Modeen* (1986), 28 Ohio St. 3d 64, 28 OBR 164, 502 N.E. 2d 634; *State* v. *Robinson* (1986), 28 Ohio St. 3d 65, 28 OBR 165, 502 N.E. 2d 634. Thus, the question certified to this court in today's cases has already been decided.

However, it is well-established that "[c]ertification of the record of a case to the Supreme Court because of conflict between judgments of Courts of Appeals upon any question, brings the entire case before the Supreme Court for review." *Couk* v. *Ocean Acc. & Guar. Corp.* (1941), 138 Ohio St. 110, 20 O.O. 65, 33 N.E. 2d 9, paragraph one of the syllabus. On this basis, we turn now to a consideration of the remaining issues presented by the cases at bar.

In addition to the First Amendment issues resolved in *Meadows*, *supra*, appellants herein raise additional challenges to the constitutionality of R.C. 2907.323(A)(3) which were not addressed in that decision. In determining the validity of these challenges, we must remain mindful that all legislative enactments enjoy a strong presumption of constitutionality. *State, ex rel. Dickman* v. *Defenbacher* (1953), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus.

Appellants first argue that R.C. 2907.323(A)(3) violates the constitutional prohibition against vagueness and overbreadth. The statute provides in pertinent part:

"(A) No person shall do any of the following:

"* * *

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Appellants contend that the statute is overbroad because it sweeps within its ambit other activities that constitute an exercise of constitutionally protected expression. For example, the use of the term "nudity" is challenged as overly broad, since that term encompasses morally innocent states of nudity as well as lewd exhibitions. Thus, it is argued, the statute fails to define in a sufficiently narrow manner the criminal conduct it prohibits. See, *e.g.*, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415.

We do not agree with this analysis. The First Amendment doctrine of overbreadth is limited in its application to laws in which the deterrence of protected activities is

substantial. Where, as here, a statute regulates conduct rather than pure speech, its overbreadth "* * * must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 615. For the following reasons, we find that R.C. 2907.323(A)(3) is not constitutionally infirm on the basis of overbreadth.

It is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that "* * * nudity, without more is protected expression * * *," even where the subject depicted is a child. *New York* v. *Ferber* (1982), 458 U.S. 747, 765, fn. 18. However, when the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions, quoted *supra*, is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, *i.e.*, the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.

In the area of child pornography, the United States Supreme Court has directed that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written *or authoritatively construed.*" (Emphasis added.) *Ferber*, *supra*, at 764. As we construe it today, R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and

where the person depicted is neither the child nor the ward of the person charged.

Appellants further argue that R.C. 2907.323(A)(3) is impermissibly vague in that the term "minor" is not defined with sufficient precision. Appellants contend that in using only the term "minor" without elaboration, the statute fails to limit its proscription to "* * * works that *visually* depict sexual conduct by children below a specified age" (emphasis *sic*) as mandated by *Ferber*. *Id.* at 764. We cannot agree.

A criminal statute is impermissibly vague only where it is so imprecise and indefinite that persons of ordinary intelligence "* * * must necessarily guess at its meaning and differ as to its application." *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 54 O.O. 2d 162, 266 N.E. 2d 571, syllabus. See, also, *Connally* v. *General Constr. Co.* (1926), 269 U.S. 385, 391. While R.C. Chapter 2907 does not define the word "minor," this omission is not fatal. Any term which is not defined by a statute is accorded its common, ordinary meaning. *State* v. *Dorso* (1983), 4 Ohio St. 3d 60, 62, 4 OBR 150, 152, 446 N.E. 2d 449, 451. We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

Appellants next argue that R.C. 2907.323(A)(3) lacks a requirement of scienter and is therefore unconstitutional. Appellants rely on the statement of the *Ferber* court at 765 that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

Our review of R.C. 2907.323(A)(3) reveals that no particular degree of scienter is specified. The statute differs in this respect from R.C. 2907.321 and 2907.322, which both require "knowledge of the character of the material or performance involved * * *." However, the omission of this element from the delineation of the offense does not render the statute fatally flawed. R.C. 2901.21(B) provides:

"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. *When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.*" (Emphasis added.)

As noted above, R.C. 2907.323(A)(3) does not specify any degree of culpability. Nor does it "* * * plainly indicat[e] a purpose to impose strict liability * * *" Therefore, pursuant to R.C. 2901.21(B), the degree of culpability required to commit the offense is recklessness. *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State* v. *O'Brien* (1987), 30 Ohio St. 3d 122, 124, 30 OBR 436, 437, 508 N.E. 2d 144, 146.

The term "recklessness" is defined in R.C. 2901.22(C):

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

This standard of recklessness is sufficient, in our view, to satisfy the requirement in *Ferber* of "some element of scienter." *Id.* at 765. Scienter is the equivalent of guilty

knowledge. *State* v. *Jacobellis* (1962), 173 Ohio St. 22, 18 O.O. 2d 207, 179 N.E. 2d 777, paragraph two of the syllabus, reversed on other grounds (1964), 378 U.S. 184. In *Jacobellis*, this court construed the term "knowingly possess," as used in R.C. 2905.34 (since repealed), as including *both* scienter (guilty knowledge) *and* "mens rea" (guilty purpose). *Id.* Thus, scienter may be a lesser standard than that contained in the term "knowingly." We cannot require the state to prove that the defendant possessed the material in question "knowingly," because innocent motive or purpose is irrelevant to the existence of knowledge as defined in R.C. 2901.22(B). *State* v. *Wenger* (1979), 58 Ohio St. 2d 336, 339, 12 O.O. 3d 309, 311, 390 N.E. 2d 801, 803, fn. 3. By contrast, a motive or purpose may be highly significant to a determination of whether a defendant has violated R.C. 2907.323(A)(3). For example, the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) excuse possession of otherwise outlawed material where the motive or purpose is innocent. Therefore, the degree of culpability required by R.C. 2907.323(A)(3) is something less than "knowing" possession.

We note that R.C. 2901.22, which defines the various levels of culpability, ranks "recklessly" just below "knowingly" in degree. R.C. 2901.22(E). The definition of recklessness in R.C. 2901.22(C) speaks of a perverse disregard for a *known* risk. Thus, "some element of scienter" is involved, which is that that *Ferber* requires. Accordingly, we find that recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3). Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties. The inclusion of the proper purposes exceptions demonstrates that criminal liability

attaches only where possession can have no legitimate purpose.

The state may prove the required notice by demonstrating, for example, the defendant's attempts to conceal the material or to disguise his ownership, his possession of a massive amount of such material, or the obviousness of the character of the material. *Mishkin* v. *New York* (1966), 383 U.S. 502, 511. The state need not prove that the accused was aware of the *actual content* of the material, but only that he was on notice as to its nature or character. See *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 363-364, 10 O.O. 3d 485, 490-491, 384 N.E. 2d 255, 262.

Appellant Osborne contends that the trial court erred in overruling his motion for acquittal since the essential element of scienter was not proven at trial. However, our review of the record reveals that appellant never objected to the omission of this element from the charge to the jury. Appellant's own proposed jury instructions were completely silent on the element of scienter. Where a party complaining of error could have called, but did not call, the error to the trial court's attention at a timely juncture, the error is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, paragraph one of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911. In such a case, the alleged error may warrant reversal only if it rose to the level of plain error and prejudiced appellant. *State* v. *Adams*, *supra*, at 153, 16 O.O. 3d at 170, 404 N.E. 2d at 146.

In concluding that the omission of the element of recklessness herein does not constitute plain error, we find support in *Adams*, *supra*. There, the essential element of recklessness was also omitted from the jury charge without a defense objection. This court held that this omission did not *per se* constitute plain error. *Id.* at paragraph two of the syllabus. A case-by-case approach was adopted, in which the record of the case is reviewed to determine whether a manifest miscarriage of justice will result if the conviction is permitted to stand. *Id.* at paragraph three of the syllabus. Our review of the record reveals that appellant himself testified that he gathered the photographs that were the basis of the charge and mounted them in an album, that he had last looked at the album about six months before, and that he had been told that the subject of the photographs was fourteen years old. The photographs themselves depict a nude boy, obviously a minor, in various lewd poses. Given this state of the record, we have no difficulty finding that the jury would have believed, beyond a reasonable doubt, that appellant was aware of the nature of the photographs in his possession. Accordingly, appellant would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand. *State* v. *Underwood* (1983), 3 Ohio St. 3d 12, 3 OBR 360, 444 N.E. 2d 1332, syllabus.

Appellant Young contends that the indictment in his case is fatally defective, in that no mention is made therein of any element of scienter. The indictment in question states in pertinent part that Young "did possess material that shows a minor * * * in a state of nudity * * * in violation of O.R.C. § 2907.323(A)(3) * * *." In rejecting appellant's contention, we note that appellant pleaded no contest to the charge in the indictment. A plea of no contest "* * * is an admission of the truth of the facts alleged in the indictment * * *." Crim. R. 11(B)(2). By conceding the truth of the facts set forth in the indictment, appellant admitted that the material that formed the basis for the charge was in his possession. In order to admit that the material described in the indictment was in his possession, appellant necessarily admitted his awareness of the possession, and of the nature, of the material described. Our review of the record

reveals that the photographs in question [1] obviously depict a minor in a state of nudity, which in at least one instance constitutes a graphic focus on the genitals. Appellant's conviction must stand.

Appellants next argue that R.C. 2907.323(A) is unconstitutionally vague because it fails to specify whether the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are negative elements to be proven by the state, or affirmative defenses, which

[1] Appellant Young contends that the court of appeals erroneously considered these photographs since they were not properly admitted into evidence. The photographs were not marked as state exhibits or formally introduced and admitted. However, we agree with the state's argument that it is not necessary to formally mark, introduce and admit items of evidence when a no contest plea is entered under Crim. R. 11 and R.C. 2937.07.

Crim. R. 11 provides in pertinent part:

"(B) Effect of guilty and no contest pleas. * * *

"* * *

"(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information or complaint * * *."

R.C. 2937.07 provides in pertinent part:

"If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly. * * *"

Crim. R. 11 requires that the defendant accused of a felony be informed of the effect of a plea of no contest. Crim. R. 11(C)(2). Under R.C. 2937.07, the judge may make a finding of guilty from the explanation of the circumstances. Neither provision requires a formal admission of exhibits.

Our review of the record reveals that the photographs were discussed by the parties at the hearing. They were properly considered by the trial court as part of the explanation of the circumstances of the no contest plea. See *Cuyahoga Falls* v. *Bowers* (1984), 9 Ohio St. 3d 148, 9 OBR 438, 459 N.E. 2d 532. As such, they were properly considered on appeal, even though they were not formally admitted as record exhibits.

must be proven by the accused. However, we find that the "proper purposes" exceptions are clearly intended to be affirmative defenses.

R.C. 2901.05(C) defines an "affirmative defense" as "* * * either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Neither R.C. 2907.323(A)(3)(a) nor (b) expressly designates the exceptions contained therein as affirmative defenses. However, the exceptions clearly constitute excuses or justifications for the possession of otherwise outlawed material, as they comprise circumstances under which the possession would be legitimate. The existence or nonexistence of a proper purpose is certainly a matter "* * * peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." While proof of proper purpose may come from objective sources, the accused will know better than any other person whether a proper purpose exists, and will be in the best position to adduce relevant evidence. See *State* v. *Doran* (1983), 5 Ohio St. 3d 187, 193, 5 OBR 404, 409-410, 449 N.E. 2d 1295, 1300. Therefore, we hold that the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2). Accordingly, the burden of proof rests with the accused. R.C. 2901.05(A).

Appellant Young's final argument regarding the constitutionality of R.C. 2907.323 posits that the sentencing provisions of that statute are disproportionate and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution. Young contends that since the offense of possessing material

showing nude minors is less serious that the offenses set forth in R.C. 2907.321(A)(5)[2] and 2907.322(A)(5),[3] the punishment should be proportionately less severe. Each of these offenses constitutes a misdemeanor of the first degree unless the the defendant has previously been convicted of the same offense, in which case the subsequent offense is elevated to a felony of the fourth degree. See R.C. 2907.321(C), 2907.322(C) and 2907.323(B).

"A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State* v. *Chaffin* (1972), 30 Ohio St. 2d 13, 59 O.O. 2d 51, 282 N.E. 2d 46, paragraph three of the syllabus.

R.C. 2907.323(B) does not mandate a minimum sentence. The trial court, in imposing sentence, may exercise a considerable degree of discretion in determining the precise sentence to impose in a particular case. The court is fully empowered to tailor the punishment to the facts of the case before it, utilizing the usual sentencing criteria set forth in R.C. 2929.13 and 2929.22. Thus, while the classification of the offenses is identical, the punishments may vary considerably according to the circumstances of each case. Moreover, the offense of which appellants have been convicted is a morally abhorrent act made possible only through the cruel exploitation of innocent, abused children. By providing for the possibility of a maximum term of imprisonment of six months for first offenders, R.C. 2929.21(B)(1), the legislature intended not only to express the moral outrage of the community, but also to deter the purchase and possession of child pornography, so that the financial incentive to produce such material would be destroyed. The General Assembly has chosen to prohibit possession as a means of combating the sexual abuse and exploitation of our children. *State* v. *Meadows*, *supra* (28 Ohio St. 3d), at 51, 28 OBR at 153, 503 N.E. 2d at 704. This court is not prepared to state that the punishment imposed for possession of child pornography is disproportionate to the seriousness of the offenses.

---

[2] R.C. 2907.321 provides in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any obscene material, that has a minor as one of its participants * * *."

[3] R.C. 2907.322 provides in relevant part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality * * *."

The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not protected by the First Amendment. *Roth* v. *United States* (1957), 354 U.S. 476, 14 O.O. 2d 331. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

Appellant Young next argues that the trial court erred in overruling his motion to suppress the photographs seized pursuant to the search warrant, alleging that the information in the underlying affidavit was stale and failed to establish probable cause for the issuance of a warrant. Specifically, appellant alleges that the information in the affidavit was based on statements from two witnesses, one of whom did not give dates for his observation of alleged child pornography in appellant's home, and another whose observations occurred approximately three months before execution of the warrant. We do not agree that this information was so "stale" that the

issuing magistrate had no reasonable basis for believing that the materials observed by the two witnesses would still be found at Young's residence. The affidavit recites in detail the circumstances surrounding the observations of the witnesses. It recites that both informants had been "picked up" by Young, who paid them to perform sex acts and to pose in the nude for photographs; that the area specified is known to the affiant as a "pick up spot" for young male prostitutes; that the witnesses had both observed similar material depicting nude minors in Young's home; and that psychological profiles of pedophiles reveal that they do not destroy their child pornography, but rather re-live their sexual experiences through photographs of previous partners.

The alleged staleness of the witnesses' information does not, in our view, affect the validity of the warrant. We note that the affidavit was sworn to within one week after the first witness was interviewed. Given the facts detailed in the affidavit, the issuing magistrate had probable cause for believing the materials described could still be found where they had been observed. In so finding, we are mindful that affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca* (1965), 380 U.S. 102, 108. Under the circumstances of this case, which involves an offense of a continuing nature, we believe that the facts stated in the affidavit justified a finding of probable cause at the time of the issuance of the warrant. *Sgro* v. *United States* (1932), 287 U.S. 206, 210.

Appellant Osborne also attacks the sufficiency of the affidavit underlying the warrant issued in his case. Osborne contends that the affidavit failed to establish probable cause since the information therein was based on unreliable hearsay, and that the affidavit did not specify

the time during which the alleged criminal activity took place. As to the time aspect, appellant's contentions are utterly baseless. In a detailed description of the circumstances giving rise to the affiant's belief that Osborne possessed child pornography, it is stated that a few days before the affidavit was sworn, two witnesses stated that the material in question was *at that time* in the possession of appellant. As to the hearsay element, we note that the use of information based on hearsay is permissible as long as the issuing magistrate is informed of some of the circumstances underlying the informant's conclusion that the contraband was where he claimed it to be, and why the affiant found the informant credible. *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114. We find that the affidavit in question passes muster on both counts. Both witnesses named appellant and correctly described his whereabouts. Appellant was also described as an "associate" of one of the witnesses who had just been arrested after a search of the premises retrieved a massive amount of child pornography. A cancelled check made out to appellant, showing appellant's address, was also found on the premises, as well as a mailing list containing the name and address of appellant. These facts gave the magistrate a basis for believing that the informants had reason to know that the contraband was where they claimed it to be, and provided corroboration for the affiant's conclusion that this information was worthy of belief. Thus, the affidavit enabled the magistrate to make a neutral determination of probable cause based on the totality of the circumstances. *Illinois* v. *Gates* (1983), 462 U.S. 213.

Appellant Osborne next contends that the photographs seized in the search were improperly admitted into evidence. He seems to argue that the photographs had to be identified and authenticated by the photographer before they could properly be deemed admissible. This argument borders on the frivolous. The relevance of the photographs is not dependent on whether they accurately depict the subject matter portrayed, but on whether ap-

pellant possessed the photographs and whether they are the sort of material outlawed by R.C. 2907.323(A)(3). Verification by the photographer would have no bearing whatsoever on these isues.

Appellant Osborne further argues that no proof was offered that the subject in the photographs was a minor. We cannot agree with appellant's contention that the minority of the person depicted was not demonstrated in the evidence. The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen by a substantial margin, and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As possession of these photographs alone would support appellant's conviction, we need not consider whether the state proved the minority of the subject in the sole remaining photograph.

Appellant Osborne argues that the trial court erred in failing to instruct the jury that the term "nudity" as used in R.C. 2907.323(A)(3) refers to a lewd exhibition of the genitals. However, since appellant neither requested such a charge nor objected to the instructions as given, any claim of error has been waived. Crim. R. 30; *State* v. *Underwood*, *supra*. Nor does the plain error exception have any relevance here, as the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity under R.C. 2907.323(A)(3), as we hold today. We find that no reasonable juror could believe that the photographs involved herein were anything but a lewd display. See *Underwood*, *supra*, at syllabus.

Accordingly, based upon the foregoing, the judgments of the court of appeals are hereby affirmed.

Judgments affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES, WRIGHT, and H. BROWN, JJ., concur.

THE SUPREME COURT OF OHIO
COLUMBUS

(Title Omitted in Printing)

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 31st day of August, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

(Title Omitted in Printing)

ENTRY

UPON CONSIDERATION of the motion filed by counsel for appellant to withdraw this Court's mandate to the Court of Appeals, or, to stay execution of the mandate, pending the appellant's appeal to The United States Supreme Court,

IT IS ORDERED that the motion for withdrawal of mandate be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that execution of the mandate and sentence be, and the same are hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 88-5986

CLYDE OSBORNE,

Appellant

v.

OHIO

Appeal from the Supreme Court of Ohio

ON CONSIDERATION of the motion of appellant for leave to proceed herein in forma pauperis and of the jurisdictional statement, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted limited to Questions I.(b), I.(d) and II. presented by the statement as to the jurisdiction. With respect to the additional questions presented, the appeal is dismissed for want of jurisdsiction and treating the papers whereon the appeal was taken as a petition for a writ of certiorari as to the additional questions presented, certiorari is denied.

June 26, 1989

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE, *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal From The Supreme Court Of Ohio

BRIEF FOR APPELLANT

RANDALL M. DANA
Ohio Public Defender

S. ADELE SHANK
Assistant Ohio Public Defender
Counsel of Record
Ohio Public Defender Commission
8 East Long Street—11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821
Counsel for Appellant

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

I. Whether, where a statute prohibiting possession or viewing of depictions of nude minors is vague and overbroad, a state supreme court may re-write the statute to bring it within constitutional boundaries and then retroactively apply the new construction to the defendant in the case in which the re-writing was done.

II. Whether a person can, consistent with the constitutional rights of privacy and to receive information, be convicted for private, in-home possession of photographs depicting minors in a state of nudity where the nudity consists of a "lewd exhibition" or "involves a graphic focus on the genitals."

III. Whether a person can, consistent with the First Amendment rights of speech, be convicted for possession of photographs depicting a nude child, where the statute as construed by the state supreme court prohibits possession or viewing of depictions of a nude child that constitute a "lewd exhibition" or involve a "graphic focus on the genitals."

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OPINIONS BELOW

The judgment of the Ohio Supreme Court from which this appeal is taken is its Rehearing Entry issued August 31, 1988 (Joint Appendix [hereinafter J.A.] 55), wherein it refused to reconsider its Judgment Entry issued July 6, 1988, by which it affirmed Appellant Clyde Osborne's conviction. Its Opinion of July 6, 1988, was reported as *State* v. *Young*, 37 Ohio State 3d 249 (1988). (J.A. 37) The opinion of the Ohio Court of Appeals, styled *State* v. *Osborne*, rendered June 10, 1986 (J.A. 25), was not reported.

JURISDICTION

The judgment of the Ohio Supreme Court affirming Appellant's conviction was entered on July 6, 1988. On August 31, 1988, the Ohio Supreme Court denied Appellant's motion for a re-hearing, and on November 10, 1988, Appellant filed his Notice of Appeal to this Court. Appellant filed his Jurisdictional Statement on November 14, 1988, and this Court noted probable jurisdiction on June 16, 1989. Jurisdiction rests on 28 U.S.C. 1257(2), since Appellant draws into question the constitutionality of Ohio Revised Code Section 2907.323(A)(3), under which Appellant is convicted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio Revised Code Section 2907.323(A)(3)

Illegal use of minor in nudity-oriented material or performances.

(A) No person shall do any of the following:

3. Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law;. . .

STATEMENT OF THE CASE

As a result of an investigation in Florida, a Jack Smith allegedly made statements asserting that Appellant Clyde Osborne was in possession of negatives from illegal photographs of children. A warrant to search Mr. Osborne's home was issued. During the search, police discovered Mr. Osborne's personal photograph album in the drawer of a desk in his bedroom. Upon looking through the pages of the album, police found on page 12 three Polaroid photographs and one snapshot. (J.A. 8-11, 14-15; R. 52-55, 66) The police arrested Mr. Osborne and filed a complaint against him for "possess[ing] material that shows a minor . . . in a state of nudity," in violation of Ohio Revised Code Annotated (Page) Section 2907.323(A)(3) (hereinafter O.k.C.). (J.A. 7) Ohio Revised Code 2907.323(A)(3) as written prohibits the possession or viewing of depictions of a "minor" who is "in a state of nudity". It provides certain exceptions to liability,

including possession or viewing by the child's parents, possession with the written consent of the parents, and possession for an artistic purpose. It contains no scienter element. It does not define "minor," and no other statute gives a definition of "minor" applicable to O.R.C. 2907.323(A)(3).

Mr. Osborne entered a plea of not guilty and demanded a jury trial. Immediately prior to trial Mr. Osborne challenged the constitutionality of O.R.C. 2907.323(A)(3) on its face and as applied to him (R. 7), on the grounds that it was "void for vagueness, overbroad, and violates the defendant's right of privacy, and that it would appear to make it illegal to possess any kind of material like that in a person's own home." (R. 3)

Mr. Osborne also moved that the jury be instructed that the word "minor" as used in O.R.C. 2907.323(A)(3) means a person under fifteen. (R. 7) He argued that the word "minor" as used in O.R.C. Chapter 2907 means one under fifteen and cited the trial court to O.R.C. 2907.04, Corruption of a Minor, which defines "minor" for the purpose of engaging in consensual sexual relations as a person under fifteen. (R. 8) The trial court did not rule on the definition of "minor" at that time. (R. 13-14).

At trial the prosecution introduced the three Polaroid photographs and one snap shot into evidence. (J.A. 8-11, 14-15; R. 52-55, 66) Testimony from the police officers who executed the search established that the pictures were taken from Mr. Osborne's home. (J.A. 8-9; R. 51-52) The evidence offered to establish the photographic subject's age was a hearsay statement made to Mr. Osborne and a notation, made by a person unknown, on the back of one of the photographs. (J.A. 9, 13, 17; R. 53, 62, 88)

Mr. Osborne testified that the photographs were given to him "four or five years" before his prosecution by, Jack

Smith. (J.A. 17; R. 86, 88) Mr. Osborne testified that he had assembled the photo album from which the photographs were taken. (J.A. 15; R. 87) He testified that he believed that his friend Jack Smith had taken the photographs (J.A. 17; R. 90) and that Mr. Smith had asked him to keep them. (J.A. 17; R. 89) He testified that he did not know that keeping the photographs was illegal. (J.A. 16; R. 87) The State offered no rebuttal. (R. 99)

Mr. Osborne asked the trial court to instruct the jury that no criminal liability could attach where the material was possessed for a proper purpose or with knowledge that the subject's parents consented to the photography. (R. 103) The trial court refused this instruction. (R. 105) Immediately prior to instructing the jury the court ruled that it would define "minor" as a person under eighteen. (R. 109)

The trial court instructed the jury, consistent with the statutory definition of nudity found in O.R.C. 2907.01(H), that nudity meant the "depiction of human male genitals, pubic area or buttocks with less than a full opaque covering." (R. 120) It defined "minor" as a person under eighteen. (R. 119) It gave no instruction on scienter and defined "possess" in a way that excluded any need to find knowledge or awareness of the character of the item possessed, namely, that "possess" meant "to have, hold, control, or to exercise dominion or custody over a thing or object." (R. 120) The jury returned a verdict of guilty. (R. 125) The trial court sentenced Mr. Osborne to six months incarceration. (R. 130)

The Court of Appeals affirmed Mr. Osborne's conviction. It said that "the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography." (J.A. 28) It held

that nudity under O.R.C. 2907.323(A)(3) includes "only . . . lewd exhibitions of the genitals" and that "nudity-oriented material" refers only to depictions of nudity which are "devoid of any legitimate purpose." (J.A. 29) It accepted the trial court's definition of "minor" as one under the age of eighteen. (J.A. 33)

On review, the Ohio Supreme Court affirmed Mr. Osborne's conviction. It found that O.R.C. 2907.323(A)(3) was "not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (J.A. 42) Noting that this Court's decision in *New York* v. *Ferber*, 458 U.S. 747, 764 (1982), required that the conduct prohibited "must be adequately defined by the applicable state law, as written *or authoritatively construed*" (the emphasis is the Ohio Supreme Court's), the court said:

> As we construe it today, R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged. (J.A. 42)

The court ruled that there was no error in the fact that the jury had not been instructed on the new definition of nudity since Mr. Osborne had not requested such an instruction. (J.A. 54) It did not explain how Mr. Osborne was to know at trial what definition of nudity would later be devised. The possession prohibited by the statute, the court said, must be for "prurient purposes" and not "morally innocent." (J.A. 42) The court noted that O.R.C. 2907.323(A)(3) "does not specify any element of scienter" but found that it did not "plainly indicat[e] a purpose to impose strict liability." (J.A. 44) The court then applied

O.R.C. 2901.21(B), which makes recklessness the culpable mental state when a statute fails to require proof of a culpable mental state and it is not clear that the legislature intended to impose strict liability. The court amended the statutory definition of recklessness, O.R.C. 2901.22(C), to require proof "that the defendant had some notice of the character of the material possessed" and that he was "on notice as to the illicit character of the material." (J.A. 45) The court found that there was no error in the fact that the jury was not instructed on the requisite mental state because Mr. Osborne's requested jury instructions were "completely silent on the element of scienter." (J.A. 46) In fact, Mr. Osborne requested that the jury be instructed that criminal liability did not attach if his possession was for one of the statutory "proper purposes." (R. 103-107) The court itself noted that these "proper purposes" make clear that the possession prohibited under the statute is one that is "*not* morally innocent" and is "for prurient purposes". (J.A. 42) The court did not mention the fact that neither the trial court nor prosecutor had said that a culpable mental state was required. It did not explain how Mr. Osborne was to foresee what would turn out to be the correct jury instruction on scienter. The court said that a conviction for private possession of the materials regulated by O.R.C. 2907.323(A)(3) does not violate the right to privacy. (J.A. 40) It affirmed that "minor" means a person under eighteen. (J.A. 43)

Mr. Osborne moved for a re-hearing in the Ohio Supreme Court, reiterating his previous assertions concerning his right to privacy and the unconstitutionality of O.R.C. 2907.323(A)(3). He argued that, even with the new elements added by the court, O.R.C. 2907.323(A)(3) was substantially overbroad and vague. He also argued

that in affirming his conviction on the basis of new offense elements that were not before the trial court, the Ohio Supreme Court had violated his right to have these elements presented in a trial court where he could answer the charges made against him. The court denied this motion (J.A. 55)

SUMMARY OF ARGUMENT

The statute under which Appellant Clyde Osborne was charged and convicted is part of a comprehensive set of provisions in O.R.C. Chapter 2907 that regulate the production, sale, distribution, and possession of materials involving depictions of minors. These provisions govern a continuum of materials depicting minors, extending from the obscene, to non-obscene sexual activity, to mere nudity. Ohio Revised Code 2907.321 prohibits the knowing creation, sale, distribution, or possession of "obscenity involving a minor." Ohio Revised Code 2907.322 prohibits the knowing creation, sale, distribution, or possession of depictions of a minor engaging in sexual activity (any sexual touching of another person), masturbation, or bestiality. Ohio Revised Code 2907.323, the provision before this Court, prohibits the creation, consent to creation, possession, or viewing of depictions of a child "in a state of nudity."

Mr. Osborne was convicted under the possession/viewing subsection of O.R.C. 2907.323, which is O.R.C. 2907.323(A)(3), for possessing four photographs that depict a minor in a state of nudity. He challenged the constitutionality of O.R.C. 2907.323(A)(3) in the trial court and on appeal. On review, the Ohio Supreme Court construed "nudity" to be nudity that constitutes a "lewd exhibition" or "involves a graphic focus on the genitals." It added an element of scienter, "recklessness," as the culpable mental state required for conviction and affirmed the lower courts' determinations that a "minor" is a person under eighteen. Having thus re-written O.R.C. 2907.323(A)(3) in an effort to meet constitutional standards, the court affirmed Mr. Osborne's conviction.

On three grounds Appellant Clyde Osborne asks this Court to reverse the Ohio Supreme Court's affirmance of his conviction.

First, by affirming Mr. Osborne's conviction, obtained under a statute unconstitutional for its invasion of First Amendment rights, the Ohio Supreme Court denied Mr. Osborne his right to due process. A facially overbroad statute is invalid and cannot be revised by a court and applied to acts done prior to the judicial revision. *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2639-2640 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Thornhill* v. *Alabama*, 310 U.S. 88, 96 (1940). To convict in such a situation violates due process since it constitutes an *ex post facto* application of what in effect is a judicially created penal prohibition. *Bouie* v. *Columbia*, 378 U.S. 347 (1964). Since there was no valid statute prohibiting Mr. Osborne's conduct at the time he acted, he was not warned that his conduct could be illegal and he may not be punished for that conduct. Further, since the Ohio Supreme Court affirmed his conviction on the basis of offense elements other than those used at trial, Mr. Osborne stands convicted of an offense for which he was not tried. *Cole* v. *Arkansas*, 333 U.S. 196 (1948). He had no opportunity to defend himself, because at trial he did not know that new elements would be added or what they might be.

Second, since Mr. Osborne's possession of the photographs occurred in his home, it is protected by his right

of privacy and his right to receive information. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). There was no allegation or evidence that Mr. Osborne had an intent to distribute the photographs. For personal use, an individual may possess photographs in his home, even if they are not constitutionally protected. The privacy right applies to the non-obscene depictions involved in this case as much as to the obscene material involved in *Stanley* v. *Georgia*. The right to receive information protects private, in-home possession of communicative materials regardless of their worth.

The materials regulated by O.R.C. 2907.323(A)(3) are not child pornography as it is defined in *New York* v. *Ferber*, 458 U.S. 747 (1982). Assuming, *arguendo*, that they are, however, Ohio does not have a compelling interest in prohibiting their private, in-home possession. Ohio has a compelling interest in protecting its children from being used in child pornography, and this interest allows it to prohibit the production and commercial distribution of child pornography. *Ferber*, 458 U.S. at 756-757. But the prohibition of private, in-home possession is not sufficiently related to combating the child pornography industry to warrant infringing Mr. Osborne's fundamental rights of speech and privacy.

Third, even as re-constructed by the Ohio Supreme Court, O.R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad. It still prohibits possession of materials protected by the First Amendment and is not narrowly tailored to serve a compelling state interest. In *Ferber*, this Court said that child pornography may be regulated to "prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 753. Ohio Revised Code 2907.323(A)(3) does not regulate child pornography because it does not require

that sexual conduct be depicted or that commercial production or distribution be involved.

Ohio Revised Code 2907.323(A)(3) regulates depictions of mere nudity, with the gloss put on that term by the Ohio Supreme Court. Photographs that are obscene or involve sexual activity are regulated by other statutes. O.R.C. 2907.321; O.R.C. 2907.322. Depictions of mere nudity, even of children, are protected by the First Amendment. *Ferber*, 458 U.S. at 765 n. 18.

This Court found that there is harm in the commercial distribution of depictions of children who have been posed in performances involving sexual conduct. It said that the posing of children in this fashion constituted child abuse. *Ferber*, 458 U.S. at 757. Ohio Revised Code 2907.323(A)(3) is not directed against this harm, because not only does it not require that sexual conduct be depicted but also because it does not require a performance or a posing. It thus is not narrowly directed against the child pornography industry.

Ohio Revised Code 2907.323(A)(3) is not limited in its application to commercial material. In *Ferber* this Court found that the children used in child pornography are harmed by the subsequent distribution in commerce of the pornographic materials, first because commercial distribution means that the depictions are widely circulated, and second because if there were no market for the depictions, the producer would have no incentive to make them. *Ferber*, 458 U.S. at 759-61. Ohio Revised Code 2907.323(A)(3) is not narrowly tailored to eliminate this harm. It does not require that the depictions be commercially produced or distributed. Rather, it prohibits mere possession or viewing. Material possessed for private use is not in commercial circulation. A viewing does not

require even possession. A person might view material belonging to another, or displayed in such a way that he views it inadvertently.

Finally, O.R.C. 2907.323(A)(3) does not serve a compelling interest to protect children because it includes three exceptions that permit possession or viewing by the child's parents, by anyone with the written consent of the child's parents, or for an artistic purpose. If the possession or viewing of this material is harmful to children, it serves no reasonable state interest to permit possession or viewing by the child's parents, or with the consent of his parents, or for an artistic purpose. These exceptions cast doubt on the compelling nature of Ohio's asserted interest because they permit possession or viewing of the regulated materials in many situations. Ohio Revised Code 2907.323(A)(3) is thus an underinclusive regulation. *Ferber*, 458 U.S. at 765. *Florida Star* v. *B. J. F.*, 491 U.S. ___, 109 S. Ct. 2603, 2612-2613 (1989).

ARGUMENT

Introduction

The violations of Mr. Osborne's rights addressed in Part I of the Argument arise from his conviction under a facially invalid statute and from the retroactive application to him of a judicial re-construction of that statute. Part II addresses the violation of Mr. Osborne's rights to privacy and to receive information, which resulted from his conviction for possessing photographs in his own home. Part III demonstrates that O.R.C. 2907.323(A)(3), even as construed by the Ohio Supreme Court below, is unconstitutionally overbroad on its face and as applied to Mr. Osborne, since it invades First Amendment rights without serving a compelling state interest.

I. A FACIALLY INVALID STATUTE THAT PROSCRIBES FIRST AMENDMENT ACTIVITY IS UNENFORCEABLE AND CANNOT BE CONSTRUED AND THEN APPLIED TO CONDUCT WHICH OCCURRED PRIOR TO THE CONSTRUCTION.

Retroactive application of a judicial construction of a facially invalid criminal statute that regulates First Amendment activity violates due process.

A. It punishes for conduct that was not illegal at the time done.

B. It penalizes the defendant for activity that he was not warned could result in criminal charges.

C. Where the construction is made only on appeal and is used to affirm, it leaves the defendant convicted of a crime for which he received no hearing and was thereby denied all the rights that attach in a criminal proceeding.

Each of these problems is present in the instant case.

A. Ohio Revised Code 2907.323(A)(3) Was Unconstitutional On Its Face Due To Its Infringement Of First Amendment Rights. Such A Statute Is Invalid And Has No Legal Effect, And A Conviction Obtained Under It Is Invalid.

No criminal statute may be given legal effect if it violates the guarantees of the United States Constitution. U.S. Const. amend. XIV, sec. 1. When a statute is invalid on its face for its vague or overbroad regulation of First Amendment activity, it has no effect, and no one can be penalized under it for acts which occurred prior to a constitutionalizing construction. An act, even if constitutionally unprotected, is not unlawful if no valid statute proscribes it.

Ohio Revised Code 2907.323(A)(3) as enacted and as applied at the time of Mr. Osborne's conviction was facially

invalid. It prohibited the possession or viewing of depictions of child nudity, where there was a "showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered make genitals in a discernibly turgid state." O.R.C. 2907.01(H). This definition does not require that the minor be post-pubertal, and thus O.R.C. 2907.323(A)(3) included even pictures of naked babies on bear skin rugs. Depictions of nudity are protected speech. U.S. Const. amend. I. In *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213 (1975), this Court noted that "a picture of a baby's buttocks" is protected material, and in *New York* v. *Ferber*, 458 U.S. 747 (1982), it said that "nudity, without more is protected expression." *Ferber*, 458 U.S. at 765 n. 18. Ohio Revised Code 2907.323(A)(3) restricted this speech activity without requiring proof of knowledge or notice on the part of the possessor or viewer of the character of the material, thereby violating due process. *Smith* v. *California*, 361 U.S. 147, 152-155 (1959); *Ferber*, 458 U.S. at 765.

The Ohio Supreme Court attempted a "saving" construction by re-defining nudity, adding scienter, and defining "minor." It then applied that construction to affirm Mr. Osborne's conviction.

Since O.R.C. 2907.323(A)(3) was invalid, Mr. Osborne had no obligation to comply with it. Citizens are not obliged to comply with an invalid statute. Where the Constitution does not require compliance, a conviction cannot stand. In *Lovell* v. *Griffin*, 303 U.S. 444 (1938), an ordinance which prohibited the distribution of any kind of literature without a permit was facially invalid. This Court said, "As the ordinance is invalid on its face, it was

not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." *Lovell*, 303 U.S. at 452-453; *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940). In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), an ordinance required a permit to hold a parade, procession, or demonstration. Since the ordinance set no standards for issuance of the permit, this Court declared it invalid. It said that "a person faced with an unconstitutional licensing law may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151. It is the validity of the statute and not the nature of the accused's conduct that determines whether a crime has been committed.

This was recognized last term in *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2639 (1989) (Scalia and Blackmun, JJ., concurring in the judgment in part and dissenting in part; joined by Brennan, Marshall, and Stevens, JJ., dissenting). Oakes was convicted under an overbroad statute, but while his appeal was pending in this Court the Massachusetts legislature amended it and eliminated the overbreadth. Justice Scalia noted that this Court has "the power to adopt a rule of law which says that the defendant's acts were lawful because the statute that sought to prohibit them was overbroad and therefore invalid." *Oakes*, 109 S. Ct. at 2640. Justices Brennan, Marshall, and Stevens joined in this proposition, saying that "a State cannot salvage a criminal conviction under a law found to be overbroad, or safeguard its right to prosecute under a law challenged as overbroad, by curing the statute's adjudicated or alleged infirmity prior to review of that conviction or ruling of statutory invalidation by the highest reviewing court." *Oakes*, 109 S. Ct. at 2642 n. 1.

The position articulated by Justice Scalia recognizes the fundamental unfairness of holding a litigant criminally

liable under a statute that cannot pass constitutional muster. If the Constitution means anything, it must invalidate criminal statutes that do not comport with it. If a statute does not have to be constitutional to be enforceable, there is no limit on a state's power to impose criminal sanctions. This Court has long recognized the invalidity of overbroad statutes. *Thornhill* v. *Alabama*, 310 U.S. 88, 96 (1940); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969). This approach has the added benefit of eliminating the statute's "chilling effect" as early as possible by allowing the first person to be prosecuted the opportunity to challenge the statute regardless of whether his own conduct might be legally proscribable under a properly drafted statute. It also provides a legislative incentive to draft statutes narrowly so that they do not invade precious First Amendment rights. A rule to the contrary would make drafting overbroad statutes "cost free." *Oakes*, 109 S. Ct. at 2639-2640.

B. Ohio Revised Code 2907.323(A)(3) Gave No Fair Warning That It Prohibited The Conduct Later Identified By The Ohio Supreme Court As Illegal When It Re-Wrote The Statute In Mr. Osborne's Case.

A conviction under an invalid statute cannot subsequently be made good even if a court hearing the case gives the statute a construction that cures its constitutional infirmity. To sustain a conviction in such a situation penalizes a person for conduct that he was not warned could be illegal at the time he acted. No one is required to guess at what possible constitutionalizing construction might be given an invalid statute.

> An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering

> his activities as disclosed by the charge and evidence introduced against him. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

Thornhill v. *Alabama*, 310 U.S. 88, 98 (1940)(citations omitted).

Statutes must "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), quoting *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). A facially invalid statute gives no warning of what future interpretation may be made in order to save it. Mr. Osborne could not have guessed and was not required to guess at what elements might be added to O.R.C. 2907.323(A)(3). He was not warned by the statutory language what conduct might legally be prohibited in the future.

The Ohio Supreme Court, by adding an element of scienter, defining "minor," and re-writing the definition of nudity to mean "lewd exhibitions" or depictions with a "graphic focus on the genitals," re-wrote O.R.C. 2907.323(A)(3). When it applied this re-written statute to Mr. Osborne's prior conduct, it violated his right to due process just as if the Ohio legislature had enacted a criminal statute and applied it retroactively. Justice O'Connor has noted "that the amendment of a statute pending appeal to eliminate overbreadth is not different, in terms of applying the new law to past conduct, from a state appellate court adopting a limiting construction of a statute to cure overbreadth." *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2638 (1989)(plurality opinion).

Although the Ex Post Facto Clause has been applied only to legislative enactments, "the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties," makes it a deprivation of due process to apply post-conviction judicial constructions to pre-construction conduct. *Marks* v. *United States*, 430 U.S. 188, 191 (1977). In *Calder* v. *Bull*, 3 Dallas 386 (1798), this Court defined *ex post facto* laws as:

> 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, 3 Dallas at 390-391.

The retroactive application of a judicial construction is equally unjust and oppressive, and for that reason, (1) a conviction had under an invalid statute cannot be validated by a "saving" construction of the statute, (2) a conviction wrongly obtained under a valid statute cannot be sustained by a construction that expands criminal liability to include the facts of the case, and (3) under these principles Mr. Osborne cannot be convicted on the basis of the new elements added to O.R.C. 2907.323(A)(3) by the Ohio Supreme Court.

1. A Conviction Under An Invalid Statute Cannot Be Saved By Re-Writing The Statute To Meet Constitutional Requirements And Applying The New Construction Retroactively.

Retroactive application of a constitutionalizing construction of an invalid statute violates due process. In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), this Court held that where a state supreme court gives a "saving" construction to a facially invalid statute, the conviction in the case before it must be overturned. A Birmingham parade-permit ordinance gave city officials broad discretion to deny a permit on consideration of "the public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 148. Shuttlesworth conducted a parade without a permit and was convicted under the ordinance. On Shuttlesworth's appeal the Alabama Supreme Court for the first time construed the ordinance to permit a denial only on "time, place, and manner" considerations and upheld Shuttlesworth's conviction by applying this new construction to him. *Shuttlesworth*, 394 U.S. at 154. This Court said that the new construction made the ordinance constitutionally valid, but characterizing the construction as "a remarkable job of plastic surgery upon the face of the ordinance," *Shuttlesworth*, 394 U.S. at 153, it stated:

> It does not follow . . . that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written.

Shuttlesworth, 394 U.S. at 155.

At the time Shuttlesworth acted, the ordinance was being applied by Birmingham officials as written, not as

subsequently construed by the Alabama Supreme Court. *Shuttlesworth*, 394 U.S. at 158. Therefore, said this Court, "[i]t would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." *Shuttlesworth*, 394 U.S. at 156.

This Court applied the same reasoning in *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), to declare invalid a Kentucky statute that regulated First Amendment activity. It said:

> [W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.

Ashton, 384 U.S. at 198, citing *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965).

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), this Court said that a "saving" construction cannot be applied retroactively unless "such application affords fair warning to the defendants." *Dombrowski*, 380 U.S. at 491 n. 7. There, persons charged under criminal statutes in Louisiana argued that the statutes were vague and overbroad, in violation of the First Amendment. This Court granted their requested injunctive relief, stating that "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution *prior to* a construction adequate to save the statute." (Emphasis supplied.) *Dombrowski*, 380 U.S. at 492. This was again recognized in *Massachusetts* v. *Oakes*, 491 U.S. ____, 109 S. Ct. 2633 (1989), which involved a conviction under a

statute that prohibited the production of photographs of nude children. Justice O'Connor, citing *Dombrowski*, noted that subsequent constructions of a statute, whether by legislative enactment or judicial interpretation, may only be applied to the complaining defendant where there was "fair warning" that his conduct was criminal at the time performed. *Oakes*, 109 S. Ct. at 2638 (plurality opinion).

When First Amendment activity is prohibited by a facially invalid statute, the statute should not stand in the way of any speech activity. Those who engage in such activity should not fear that a subsequent re-writing of the statute to limit its application to unprotected activity will criminalize their formerly legal conduct. A rule to the contrary would allow the facially invalid statute to chill all activity which falls within its ambit. The need to keep invalid statutes from chilling speech is the basis of the rule that one who challenges a penal statute for overbreadth need not himself have engaged in protected speech. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). Mr. Osborne's invalid conviction cannot be "resuscitated" by the judicial construction rendered in his case.

2. A Conviction May Not Be Based On The Retroactive Application Of A Statutory Construction Which Expands Criminal Liability.

Construing an invalid statute to make it valid has the same expansive effect as does construing a valid statute to add new conduct to its proscriptions. In both cases conduct formerly legal is made illegal. In both cases, the penalized conduct occurs before the prohibited conduct is defined. This Court has consistently found that an expansion of a valid statute by a state court violates due process if the court applies that construction in the case before it.

In *Bouie* v. *Columbia*, 378 U.S. 347 (1964), Bouie was convicted under a South Carolina trespass statute for refusing to leave a lunch counter after being ordered to so by its manager. The statute had previously been construed to prohibit only an entry following notice not to enter. The South Carolina Supreme Court, in hearing Bouie's appeal, said that the statute also applied to a refusal to leave after being ordered to leave and affirmed Bouie's conviction. This Court reversed, finding the application to Bouie of an expansive construction analogous to *ex post facto* legislation, hence a denial of due process. *Bouie*, 378 U.S. at 353-354.

In *Rabe* v. *Washington*, 405 U.S. 313 (1972), the accused was convicted of exhibiting obscenity for showing a film at his drive-in theater. The Washington Supreme Court concluded that the film was not obscene but upheld the conviction, stating that the film was obscene "in the *context* of its exhibition," namely at a drive-in theater where persons other than patrons might view it. *Rabe*, 405 U.S. at 315. That decision expanded the scope of liability by allowing conviction for showing materials that were not obscene in themselves, but obscene because of the location in which they were shown. This Court said:

> The statute under which petitioner was prosecuted . . . made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

Rabe, 405 U.S. at 315.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court held that the obscenity standards enunciated in *Miller* v. *California*, 413 U.S. 15 (1973), which expanded

obscenity liability, could not be applied against an accused whose act occurred prior to that ruling because it denied the accused fair warning of the conduct prohibited. *Marks*, 430 U.S. at 196.

3. Because Mr. Osborne Has Been Subjected To A Retroactive Application Of A Statutory Construction Which Added New Elements To O.R.C. 2907.323(A)(3), His Conviction Must Be Reversed.

Mr. Osborne did not have fair warning at the time he acted that his conduct could be illegal. No new construction of a statute can change that fact. A statute which imposes criminal liability must give notice of what is prohibited in order that those subject to its regulation may conform their conduct to it and thus avoid its sanctions. When a statute fails in this regard, no one may be punished for having failed to guess at its meaning. Under the reasoning of this Court's many decisions requiring fair notice before criminal liability may attach, Mr. Osborne's conviction cannot stand.

Bouie, *Rabe*, and *Marks* involved valid statutes expanded by judicial construction in the accused's case and applied against him in the expanded form. In the case at bar, O.R.C. 2907.323(A)(3) as enacted by the Ohio legislature was invalid. Adding new elements to an invalid statute to make it valid has the same expansive effect as does adding new elements to a valid statute.

The instant case is like *Shuttlesworth*, *Ashton*, and *Dombrowski*, in that it involves an invalid statute. The Ohio Supreme Court performed "plastic surgery." *Shuttlesworth*, 394 U.S. at 153, to make of O.R.C. 2907.323(A)(3) something quite different from what had been enacted by the Ohio legislature. It took a statute prohibiting depictions of nudity and changed it to one

prohibiting possession of depictions that constitute a "lewd exhibition" or involve a "graphic focus on the genitals" and appeal to prurient interest, where the possession is not morally innocent. It added a scienter element, and defined "minor" differently from the definition used in the rest of O.R.C. Chapter 2907. Ohio Revised Code 2907.323(A)(3) as construed bears little resemblance to the statute under which Mr. Osborne was charged and convicted.

As with the ordinance in *Shuttlesworth*, the administering authorities "thought [it] meant exactly what it said." *Shuttlesworth*, 394 U.S. at 158. The complaint filed against Mr. Osborne by a Columbus, Ohio, police officer lacked any allegation of scienter and charged that the photographs possessed depicted mere nudity. (J.A. 7) Appellee's counsel, the City Attorney of Columbus, Ohio, did not suggest to the trial court that it charge the jury that Mr. Osborne must have been aware of, or had notice of, the character of the photographs. He did not tell the court that the photographs must show anything beyond mere nudity. The trial court defined nudity using the statutory definition. O.R.C. 2907.01(H). (R. 120) It read O.R.C. 2907.323(A)(3) as imposing strict liability. It even defined "possession" in a way that did not require knowledge or notice of the character of the item possessed. (R. 120) Thus, like Shuttlesworth, Mr. Osborne did not have fair warning that his conduct could be criminal when he acted because O.R.C. 2907.323(A)(3) was being applied as written, and not as later construed on his own appeal by the Ohio Supreme Court.

Ohio Revised Code 2907.321 and 2907.322 regulate the possession of obscenity depicting minors and of sexually oriented materials depicting minors. One could not have predicted that a reviewing court would find prurient

appeal to be an element in O.R.C. 2907.323(A)(3), since those two sections govern sexually oriented materials. Under the rule of construction *in pari materia* the inference is that because O.R.C. 2907.323(A)(3) did not mention prurient interest, and other sections regulate obscene and sexually oriented depictions of children, it was not an element of O.R.C. 2907.323(A)(3). Thus, the Ohio Supreme Court's addition of a "prurient purpose" element was a surprising construction that one in Mr. Osborne's position could not anticipate.

A court, of course, may in many situations construe a criminal statute and apply the construction in the case at bar. But when it construes an overbroad statute that invades First Amendment rights to make it valid and applies that construction in the case at bar, that application is *ex post facto*. One who acted before the construction did not receive fair warning that his conduct might be criminal.

Mr. Osborne was convicted under an invalid statute. When he acted, he had no fair warning of what conduct was prohibited. His conviction cannot stand under the Ohio Supreme Court's new version of O.R.C. 2907.323(A)(3).

C. The Ohio Supreme Court Added New Elements To Ohio Revised Code 2907.323(A)(3) And Affirmed Mr. Osborne's Conviction On The Basis Of Them, Even Though Mr. Osborne Never Had A Hearing On, Or An Opportunity To Defend Against, Those Elements.

It is a violation of due process where, as in the case at bar, a state supreme court adds new elements to save a statute and then affirms the conviction, leaving the accused convicted on the basis of elements that were not in issue at his trial. When new elements are added after

conviction, the state has been excused from meeting its constitutionally required burden of proof, and the accused has been denied a hearing and the right to present a defense with the effective assistance of counsel.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970). In the case at bar, the trier of fact was not called upon to address the elements that were used by the Ohio Supreme Court to sustain the conviction. In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), Thornhill was convicted under a statute that prohibited "loitering and picketing." On appeal, the Alabama Supreme Court attempted no narrowing construction and affirmed. This Court reversed, finding no reason to determine "whether the evidence . . . could ever support a conviction founded on different and more precise charges. 'Conviction upon a charge not made would be a sheer denial of due process.'" *Thornhill*, 310 U.S. at 96, citing *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

Every criminal defendant must be given "a meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986); *California* v. *Trombetta*, 467 U.S. 479, 485 (1984); *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *In Re Oliver*, 333 U.S. 257, 273 (1948). When the accused is not notified of the elements of the offense at the time of trial, he is denied this opportunity. The Sixth Amendment as applicable to the states through the Fourteenth Amendment guarantees a person charged with a criminal offense notice of the charges against him and a hearing on those charges, with the effective assistance of counsel. Counsel cannot be effective when the elements of the crime are unknown to counsel at the time

of trial. When the trial court does not know the elements of the offense, fair determinations on the admissibility of evidence, appropriate jury instructions, the scope of voir dire and of argument cannot be made. See *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 92 (1965). When the accused does not know the elements of the charge, he cannot make rational decisions on, or assist in, his own defense.

In *Cole* v. *Arkansas*, 333 U.S. 196 (1948), Roy Cole was convicted under the second section of a two-part Arkansas penal statute. On review the Arkansas Supreme Court found the conviction not to be sustainable under the second section but affirmed it after finding that Cole had violated the first section, which prohibited substantially different conduct. This Court found a denial of due process since Cole had not had an opportunity to answer a charge under the first section:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole, 333 U.S. at 201.

Clyde Osborne is in a position similar to that of Cole. He has been convicted of a crime against which he had no opportunity to defend. As a result of the Ohio Supreme Court's re-writing of O.R.C. 2907.323(A)(3), Mr. Osborne was denied notice of the charge he faced and an opportunity to defend against it. Mr. Osborne was convicted, not by his jury, but in the closed chambers of the Ohio Supreme Court. Had Mr. Osborne known at the time of trial the age of minority, or that scienter was required, he might have made different decisions as to how to present his defense. Had he known that his possession required a

"prurient interest" and a purpose that was not "morally innocent," he could have asked the jury to decide that the evidence did not show that these elements were applicable to him. Had he known that "nudity" required a "lewd exhibition" or a "graphic focus on the genitals," he could have asked the jury to decide that the evidence did not establish that the state had met its burden of proof on these elements.

Since Mr. Osborne was not aware of the elements of the offense, he could not make a rational choice as to how to plead to the charge, and he could not make informed decisions about trial tactics. He was deprived of the effective assistance of counsel, for counsel did not know the nature of the charge. Therefore, his conviction cannot stand.

II. THE STATE MAY NOT PROHIBIT PRIVATE POSSESSION OF MATERIALS THAT DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSISTS OF A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Clyde Osborne was arrested, prosecuted, and convicted for possessing three Polariod photographs and one snap shot of a nude minor, which were seized from the drawer of a desk in the bedroom of Mr. Osborne's home during a search executed under a warrant. (R. 66) Mr. Osborne testified that he had been given the three Polaroid photographs and one snap shot in his home by a friend, Jack Smith. (R. 86, 88) There was no evidence that the photographs were commercially produced or distributed. All were kept in a photograph album that Mr. Osborne assembled for his personal use and had privately possessed for a number of years. (R. 86-87)

The state may not criminalize the private, in-home possession of photographs, regardless of their nature. "If the

First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969). The materials regulated by O.R.C. 2907.323(A)(3) as construed below are depictions of child nudity where the nudity consists of a "lewd exhibition" or "involves a graphic focus on the genitals." Whether or not these materials fall within a legitimate definition of child pornography, their private, in-home possession is protected by the First Amendment rights of privacy and to receive information. *Stanley*, 394 U.S. at 564.

The constitutional right to privacy has been recognized by this Court in many contexts. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562(1977); *Michigan* v. *Clifford*, 464 U.S. 287, 296 and n.7 (1984). The right to privacy in one's home is a fundamental guarantee of the Constitution. U.S. Const. amends. I, IV.

The First Amendment also protects the right to receive information. *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943). Every person has the right to think his own thoughts, seek his own information and come to his own truths. This right extends to information regardless of its worth. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). Unpopular ideas may not be suppressed merely because they are unpopular. *Kingsley International Pictures Corp.* v. *Regents of University of New York*, 360 U.S. 684, 688-89 (1959); *Cohen* v. *California*, 403 U.S. 15, 25 (1971). Offensive messages, so long as the means of communication are peaceful, "need not meet standards of acceptability." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

Because child pornography is not within the definition of obscenity as articulated in *Miller* v. *California*, 413 U.S. 15 (1973), it does not fall into any of the categories of materials whose content places them outside the reach of the First Amendment. Materials defined as child pornography are not necessarily obscene. *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). They are regulated even though they may have serious literary, artistic, political or scientific value. *Ferber*, 458 U.S. at 764. The purpose of their regulation is not to purge the marketplace of ideas of the information communicated, but to protect the young persons used in their production. As a consequence, the First Amendment right to receive information is more significantly invaded by a prohibition against possession of child pornography than by one against possession of materials that fall within the legal definition of obscenity.

In order to prohibit possession of non-obscene materials, the state must establish that it has a compelling interest which can be served in no less intrusive manner. *Shelton* v. *Tucker*, 364 U.S. 479 (1960). There is no need to prohibit private, in-home possession in order to stem the traffic in child pornography. The state's interest in regulating the production and sale of child pornography is to protect children from the harm suffered as a result of being posed in sexual conduct and of having the resulting depictions circulate in commerce. It is not necessary to invade the privacy of the home to protect that interest. The state's interest in stopping the trade in commercially produced child pornography is adequately served by regulating production, sale and distribution. This Court said in *Stanley:*

> [W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution.

> That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Stanley, 394 U.S. at 567-568.

The state's interest in regulating the private possession of child pornography is no greater than its interest in prohibiting the private possession of obscene materials. Possession without intent to sell is not a part of the production or distribution of child pornography. The harm of production has passed and distribution and circulation have ceased when the materials are privately possessed. Whatever message is conveyed by a depiction of unclothed minors, be it familial tenderness or sexual attraction, the state has no interest in suppressing that message in the privacy of the home. While controlling "the moral content of a person's thoughts . . . may be a noble purpose . . . it is wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 565-66.

Even if the state's interest in prohibiting possession of child pornography could outweigh First Amendment rights to private, in-home possession of such materials, the materials regulated by O.R.C. 2907.323(A)((3), as discussed in Part III below, are not child pornography because they do not depict sexual conduct and therefore do not pose the same threat to children's safety as does child pornography. The state's interest in prohibiting private, in-home possession of the materials regulated by O.R.C. 2907.323(A)(3) is less than its interest in prohibit-

ing child pornography and does not outweigh the First Amendment rights of privacy and to receive information.

Regardless of the presence or absence of constitutional protection for the contents of the photographs taken from Mr. Osborne's personal photo album, his right to possess and view those photographs and to reap whatever message they may yield cannot be infringed.

III. THE STATE MAY NOT, CONSISTENT WITH FIRST AMENDMENT RIGHTS OF SPEECH, PROHIBIT THE POSSESSION OR VIEWING OF MATERIALS WHICH DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSTITUTES A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Ohio Revised Code 2907.323(A)(3), as construed by the Ohio Supreme Court, prohibits the possession or viewing of depictions of nude children, where the nudity constitutes a lewd exhibition or involves a graphic focus on the genitals. (J.A. 42) As is discussed below:

A. This prohibition is overbroad because it encompasses materials protected by the First and Fourteenth Amendments.

B. It is not narrowly drafted to serve a compelling state interest that justifies an invasion of First Amendment rights.

A. Depictions Of Child Nudity, Where The Nudity Constitutes A "Lewd Exhibition" Or "Involves A Graphic Focus On The Genitals," Are Protected Speech.

The Ohio Supreme Court held that the materials regulated by O.R.C. 2907.323(A) are those depicting minors in a state of nudity where the nudity constitutes a "lewd exhibition" or "involves a graphic focus on the genitals."

(J.A. 42) It held that such depictions are "child pornography" and as such are unprotected by the First Amendment. (J.A. 42) The Ohio Supreme Court's decision expands the definition of child pornography into the area of protected speech.

Child pornography was defined in *New York* v. *Ferber*, 458 U.S. 747 (1982). It must "*visually* depict sexual conduct by children below a specified age." "Sexual conduct" must be defined and "some element of scienter" is required. It need not be obscene and need not appeal to prurient interest. *Ferber*, 458 U.S. at 764-65. The state's interest in regulating child pornography is "[t]o prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 754. It is "the nature of the harm to be combated" that defines the limits of child pornography. *Ferber*, 458 U.S. at 764. Child pornography must be produced for commercial purposes. *Ferber*, 458 U.S. at 759-761.

The *Ferber* definition of child pornography draws the line between protected and unprotected speech where depictions of children are involved. This Court noted in *Ferber* that child pornography is not necessarily without literary, artistic, political, or social value. *Ferber*, 458 U.S. at 761, 764. Child pornography, unlike other types of unprotected speech, need not be essentially worthless. It is not the content of child pornography that makes it unprotected. Child pornography is unprotected because of the state's compelling interest in protecting children. *Ferber*, 458 U.S. at 753. When materials depicting children do not involve sexual conduct and are not produced or distributed commercially, it no longer serves the state's interest in the protection of children to regulate the materials, and the materials then fall outside the very narrow categories of unprotected speech. The materials regu-

lated by O.R.C. 2907.323(A)(3) are not child pornography and are protected by the First Amendment.

As will be shown in the remainder of Sub-Part A, these materials are not child pornography because (1) they do not involve depictions of sexual conduct, and (2) they need not be produced, sold or possessed for commercial purposes.

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1. Ohio Revised Code 2907.323(A)(3) Prohibits Possession Or Viewing Of Materials That Do Not Depict Sexual Conduct.

Child pornography need not be obscene but must depict sexual conduct. *Ferber*, 458 U.S. at 765. The films that formed the basis for the prosecution in *Ferber* showed two boys masturbating. *Ferber*, 458 U.S. at 752. This Court approved New York's definition of acts of sexual conduct: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals," *Ferber*, 458 U.S. at 765, on the assumption that "the New York courts will [not] widen the possibly invalid reach of the statute by giving an expansive construction of the proscription of 'lewd exhibition[s] of the genitals.'" *Ferber*, 458 U.S. at 773.

The Court of Appeals in this case interpreted O.R.C. 2907.323(A)(3) to prohibit depictions of nudity that involve a "lewd exhibition of the genitals." (J.A. 28-29) The Ohio Supreme Court expanded that definition by dropping the requirement that genitalia be depicted. A "lewd exhibition" is all that the court required. To some, simple nudity may be a lewd exhibition. To others, a lewd exhibition may be a particular position or stance assumed by the photographic subject. The Ohio Supreme Court's requirement that the regulated depictions appeal to prurient interest adds nothing to the meaning of "lewd exhibition." The words "prurient" and "lewd" are equivalent and provide no guidance as to what may be depicted. What is certain, however, is that no sexual conduct is necessary. Possession of a depiction of a minor engaged in masturbation, bestiality or sexual activity with another person falls under the prohibitions of O.R.C. 2907.321 or 2907.322.

The phrase "graphic focus on the genitals" even more clearly fails to limit O.R.C. 2907.323(A)(3) to sexual conduct. It simply requires a photograph showing the genitals, presumably in such a way as to direct the viewer's attention to the genitals. This language relates to the camera focus or angle rather than the activity of the photographic subject. The films in *Ferber* showed masturbation. This Court's use of "lewd exhibition of the genitals" must be read in light of that fact. This Court did not indicate that a mere depiction of genitals, from whatever camera angle or with whatever focus, could constitute child pornography.

Ohio Revised Code 2907.323(A)(3) was not intended to regulate depictions of sexual conduct. As noted, companion sections of the Ohio Revised Code prohibit the possession of such materials. O.R.C. 2907.321; O.R.C. 2907.322. The Ohio Supreme Court's use of the phrases "lewd exhibition" and "graphic focus on the genitals" does not change the fact that the statute prohibits depictions of mere nudity. These phrases provide little guidance as to what photographs may be possessed without running the risk of prosecution.

2. Ohio Revised Code 2907.323(A)(3) Prohibits Possession Of Depictions That Are Not Produced, Distributed Or Possessed For Commercial Ends.

Ohio Revised Code 2907.323(A)(3) prohibits mere possession or viewing. The materials need not have been

created for a commercial purpose, nor need they be possessed or viewed for a commercial purpose. In *Ferber* this Court found commercial distribution to be "intrinsically related to the sexual abuse of children" that is involved in posing them for photographic depictions of sexual conduct. It noted that commercial distribution caused emotional harm, *Ferber*, 458 U.S. at 759 n. 10, and that the distribution network "must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ferber*, 458 U.S. at 759. It said that "the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials." *Ferber*, 458 U.S. at 761.

This Court thus viewed commercial distribution as exacerbating the sexual abuse involved in the production of child pornography and on that basis found that New York had a compelling interest in prohibiting its production. Ohio Revised Code 2907.323(A)(3), however, is not limited in application to commercial materials. It does not require that the materials be commercially produced or distributed. It does not require that the photographic subject be posed but covers candid photographs, even photographs taken without the subject's knowledge. It does not require that the possession be for a commercial purpose.

The photographs involved in this case are Polaroids and a snap shot. They were not produced commercially. Mr. Osborne did not acquire them commercially, and he did not possess them for a commercial purpose. They had been in Mr. Osborne's home for "four or five years." (R. 86) Non-commercial photographs which do not depict sexual conduct are not child pornography.

B. The Ohio Supreme Court's Construction Of Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Serve A Compelling State Interest.

A state must have a compelling interest when it legislates to limit First Amendment activity. The First Amendment needs "breathing space," and statutes restricting speech "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-612 (1973). Even when the state's purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the need can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Ohio Revised Code 2907.323(A)(3) as construed does not meet this test, because it is not narrowly tailored to serve a state interest which warrants the invasion of First Amendment rights. As will be shown in this Sub-Part B, (1) O.R.C. 2907.323(A)(3) does not serve a compelling state interest because it does not govern materials that depict sexual conduct, and the statutory exceptions in O.R.C. 2907.323(A)(3) allow possession in circumstances inconsistent with a goal of protecting children, and (2) it is not narrowly tailored to protect children because it prohibits mere possession and viewing of materials not inherently harmful to the children depicted.

1. Ohio Revised Code 2907.323(A)(3) Does Not Serve A Compelling State Interest.

This Court has carefully scrutinized rationales that assert the protection of minors as a justification for invading the First Amendment. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Smith, Judge* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979). The Ohio Supreme

Court said that O.R.C. 2907.323(A)(3) serves Ohio's interest in the protection of children. (J.A. 51) The statute as construed below does not serve that interest. Ohio Revised Code 2907.323(A)(3) was not intended to protect children from sexual abuse. Other statutes regulate materials that depict minors in an obscene way or engaging in masturbation, bestiality or sexual activity. O.R.C. 2907.321; 2907.322. No physical contact with the photographic subject is involved in the depictions regulated by O.R.C. 2907.323(A)(3). This remains true under the Ohio Supreme Court's construction. If any touching, including masturbation is depicted, prosecution would have to proceed under O.R.C. 2907.321 or O.R.C. 2907.322, which are specifically aimed at materials depicting such activities.

That O.R.C. 2907.323(A)(3) is not directed at eliminating child sexual abuse is evident from three exceptions to liability. First, liability is negated by parental consent to the production, possession, use or transfer of the regulated materials. Second, liability is negated where the possessor or viewer is the depicted child's parent. Third, liability is also negated by the fact that the possession is for an "artistic" purpose. However, in O.R.C. 2907.321 and O.R.C. 2907.322, the sections that regulate depictions of sexual conduct, liability is not negated by parental possession, parental consent, or artistic purpose, although those two sections, like O.R.C. 2907.323(A)(3), recognize a list of "proper purposes" based on legal, medical, scientific, or religious motives.

When it construed O.R.C. 2907.323(A)(3), the Ohio Supreme Court changed the character of the depictions regulated to those that are not "morally innocent," that appeal to "prurient interest" and involve "a graphic focus on the genitals" or constitute "lewd exhibitions." (J.A. 42)

The court did not eliminate the parental possession, parental consent, or artistic purpose exceptions. Under the court's construction, a parent's consent to the use of his child in lewd exhibitions which appeal to prurient interest negates liability for possession, use, or viewing of those materials. Lewd exhibitions of children may also be possessed by parents or for artistic purposes without criminal penalty. If the court's construction had successfully changed O.R.C. 2907.323(A)(3) to regulate only depictions involving sexual conduct, the parental possession, parental consent, and artistic purpose exceptions would make the construction more damaging than if there were no statute at all.

The exclusion of depictions possessed by parents, with parental consent, or for an artistic purpose makes O.R.C. 2907.323(A)(3) underinclusive. *Ferber*, 458 U.S. at 765. If the possession of the materials regulated were inherently harmful to the children depicted, there would be no justification for these exceptions. When the state asserts a compelling interest but enacts legislation that only partially serves that interest, the interest is not truly compelling. *Florida Star* v. *B. J. F.*, 491 U.S. ___, 109 S. Ct. 2603, 2612-2613 (1989). A statute "cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 109 S.Ct. at 2613 (Scalia, J., concurring in part and concurring in the judgment).

The state's interest in regulating child pornography is "safeguarding the physical and psychological well being of a minor." *Ferber*, 458 U.S. at 756-57. Child pornography harms its minor subjects through the sexual abuse and molestation which occurs in production, *Ferber*, 458 U.S. at 757-58, and through the psychological harm which results from the distribution and circulation of the mate-

rials in commerce. *Ferber*, 458 U.S. at 759-60. The materials regulated by O.R.C. 2907.323(A)(3), however, do not involve sexual conduct. They depict no sexual abuse or molestation of any child. Ohio Revised Code 2907.323(A)(3), unlike the New York statute in *Ferber*, does not require the posing of a child in a performance. The depiction may be a candid photograph, taken even without the knowledge of the child subject. There is no physical harm involved. The materials regulated by O.R.C. 2907.323(A)(3) are not limited to those commercially distributed or produced. They include, as in this case, snap shots and Polaroid photographs privately possessed for years. The psychological harm caused by commercial distribution and circulation is not addressed by O.R.C. 2907.323(A)(3). Ohio has no compelling interest in prohibiting the possession or viewing of such materials.

2. Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Protect Children.

When the state seeks to protect a compelling interest by regulating communicative materials, it must use the least restrictive means available to do so. *Shelton* v. *Tucker*, 364 U.S. 479 (1960). While Ohio has an interest in protecting its children from participation in physically and psychologically harmful photographic production, it may not sweep in protecting that interest so broadly as it has done in O.R.C. 2907.323(A)(3).

The materials regulated by O.R.C. 2907.323(A)(3) depict no sexual conduct and need not be commercially produced or circulated. They are not child pornography. There is no demonstrated connection between possession of such materials and any physical or psychological harm to the photographic subject. If the First Amendment is to be invaded, there must be a clear correlation between the

prevention of the abuse of minors and the infringement of First Amendment rights. More than mere speculation is required.

Even if the materials regulated by O.R.C. 2907.323(A)(3) were child pornography as defined in *Ferber*, regulation of private possession is not the least restrictive means by which to serve the state's interest. While commercial distribution is the essence of the child pornography industry, possession by a single individual who has no intention of distributing is quite different. Mere possession does not involve any physical abuse of the child depicted and necessarily means that circulation has stopped. A possessor is not part of the child pornography industry. Any transfer of child pornography that is privately possessed would be punishable under O.R.C. 2907.321 and O.R.C. 2907.322. It is not necessary to prohibit private possession to dry up the market in child pornography. This Court rejected such a justification regarding obscenity in *Stanley* v. *Georgia*, 394 U.S. 557, 568 (1969).

Ohio Revised Code 2907.323(A)(3), in addition to possession, prohibits viewing. A depiction prohibited by O.R.C. 2907.323(A)(3) might be on the screen of a drive-in theater, where passersby can see the screen. Thus, one who has no connection with the depiction might view it. Viewing is so remote from the production or distribution of child pornography that no state interest is served by prohibiting it. A viewer, like a possessor, is not part of the child pornography industry.

Ohio Revised Code 2907.323(A)(3), as construed by the Ohio Supreme Court, is unconstitutionally overbroad. It regulates materials that are not child pornography. It does not serve a compelling interest in protecting children

from exploitation in the child pornography industry. It violates First Amendment rights because it is not narrowly tailored to serve the state's interest in protecting children by the least restrictive means.

CONCLUSION

The Ohio Supreme Court affirmed Clyde Osborne's conviction under O.R.C. 2907.323(A)(3), a statute which was invalid for its invasion of First Amendment rights at the time Mr. Osborne was charged and tried. Because the statute was invalid, Mr. Osborne's conviction was invalid.

The Ohio Supreme Court attempted to save O.R.C. 2907.323(A)(3) by giving it a construction which added new elements to the offense. At the same time, the court held that Mr. Osborne's conviction under the invalid statute could stand under the new construction. Mr. Osborne's conviction should have been reversed regardless of whether the new construction saved O.R.C. 2907.323(A)(3). He did not have notice at the time he acted that his conduct was illegal. He did not have an opportunity at trial to defend against the elements of O.R.C. 2907.323(A)(3) as it was later construed.

Mr. Osborne was convicted for his private, in-home possession of depictions of nude minors. Every person has the right to read or look at whatever material he pleases in the privacy of his own home.

The Ohio Supreme Court failed in its effort to constitutionalize O.R.C. 2907.323(A)(3). The statute continues to regulate constitutionally protected materials. The court expanded the definition of child pornography to include depictions of nudity, which although lewd, do not portray sexual conduct and are not commercially produced or distributed. Even with this construction, O.R.C.

2907.323(A)(3) is not narrowly drafted to serve a compelling state interest. Moreover, it prohibits possession and viewing, acts which are not related to the activity of the child pornography industry. At variance with its purported goal of protecting children, it permits possession and viewing under three exceptions that belie Ohio's assertion of a compelling interest and render O.R.C. 2907.323(A)(3) underinclusive.

For the above reasons, Mr. Osborne requests that this Court reverse the judgment of the Ohio Supreme Court and order that court to discharge him and to dismiss all proceedings against him in this matter.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

S. ADELE SHANK
Assistant Ohio Public Defender
Counsel of Record
Ohio Public Defender Commission
8 East Long Street—11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821
Counsel for Appellant

(7)

Supreme Court, U.S.
FILED
SEP 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLEE, STATE OF OHIO

Ronald J. O'Brien
City Attorney
City of Columbus, Ohio
City Hall
90 West Broad Street
Columbus, Ohio 43215-4184
(614) 645-6902

Counsel of Record for Appellee

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., P.O. Box 856 • Grove City, Ohio 43123

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59 pp

QUESTIONS PRESENTED

I. Does the First Amendment to the United States Constitution and *Stanley* v. *Georgia* 394 U.S. 557 (1969) guarantee to citizens the fundamental right and liberty to privately possess child pornography?

II. May a state prohibit private possession of child pornography consistent with the First Amendment where the material is a visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals?

III. May a State Supreme Court consistent with due process authoritatively construe a statute prohibiting possession of child pornography and affirm a conviction under that construction where the legislative intent of the statutory scheme is clear and the narrowing construction foreseeable?

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STATEMENT OF THE CASE

In June, 1985, United States postal inspectors began an investigation of Century Twentieth Studios in Holiday, Florida, regarding the use of the United States mails to transmit child pornography. (Joint Appendix [hereinafter J.A.] 2-6, reflects the facts leading to Osborne's arrest.) The principals in Century Twentieth Studios were Jack S. Smith and Daniel S. Knous.

As a result of that investigation, postal inspectors had correspondence with Jack S. Smith. Smith and a postal inspector had correspondence through the mails and Smith offered the postal inspector various photographs depicting sexual activity between adults and minors. In one such item of correspondence Smith wrote to the postal inspector that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend of his in Ohio. Subsequently, a test letter was addressed and delivered to a post office box holder in Holiday, Florida, in which the postal inspectors ordered and paid for child pornography. Pursuant to that order Smith deposited in the United States mails an envelope that contained twenty color photographs of minors engaging in sexually explicit conduct. Some of those photographs depicted sexual conduct between Knous and minor females.

As a result of this investigation, on July 19, 1985 postal inspectors executed a federal search warrant on the premises of Jack S. Smith in the State of Florida, seized thousands of photographs which depicted minors engaging in sexual conduct, as well as other books and records. Smith and Knous were arrested and subsequently convicted on federal charges arising from the use of the United States mail to distribute child pornography.

After his arrest, Smith advised Postal Inspector Witouski that photographic negatives of child pornogra-

phy were in the possession of a friend of his in Ohio named Clyde.

Knous, after his arrest, advised Postal Inspector Witouski that the child pornography negatives were in the possession of an associate of Smith's named Clyde Osborne, who resided in Columbus, Ohio.

During the execution of the federal search warrant in Florida, mailing lists were seized. Included on one such list that was seized by the postal inspectors was the name of Clyde Osborne, 793 North Park Street, No. 3, Columbus, Ohio, 43215. When Postal Inspector Witouski reviewed the evidence seized from the federal search warrant on July 22, 1985 he located among that evidence a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 (Three dollars and 50/100), dated June 3, 1985. The reverse side of the cancelled check disclosed that the address of 793 North Park Street, No. 3, Columbus, Ohio, 43215 was inscribed thereon, and that the check had been cashed at Christie's Market, 680 North High Street, Columbus, Ohio, which is within several blocks of Osborne's address on Park Street.

Postal Inspector Witouski notified United States Postal Inspector Paul Hartman, Cleveland, Ohio, who related all of the above information to Detective James A. Phillips, Columbus Police Department, Child Pornography Task Force.

Based on the above information, Detective Phillips applied for and obtained a search warrant to search the premises of Clyde Osborne at 793 North Park Street, No. 3, Columbus, Ohio, 43215 for child pornography. A copy of the search warrant is contained in the Joint Appendix. (J.A. 2-6)

The items seized from Osborne's premises pursuant to the search warrant were a letter to Jack Smith, a brown envelope containing negatives, a brown photo album, mis-

cellaneous photos, film and camera equipment, and a magazine entitled Ohio Gay Guide. (State's Exhibit No. 3, Search Warrant; R.3, R.36)

Thereafter, Osborne was charged by criminal complaint in the Franklin County, Ohio Municipal Court with a violation of Section 2907.323(A)(3), Ohio Revised Code, (J.A. 7), and the matter was scheduled for a jury trial.

Prior to trial, Osborne's counsel moved to dismiss the charges on the grounds that the Ohio statute was vague, overbroad, and violated a right to privacy. (R.3). The trial court overruled this motion. (R.7) At the trial the brown photo album was marked as evidence and identified by the investigating detectives. (J.A. 8, 15).

The brown photo album contained numerous photographs of nude males of various ages and Osborne admitted that he had taken some of those photographs. (J.A. 12).

Osborne had mounted the four photographs that are the subject of this prosecution in that brown photo album.(J.A. 18).

Those photographs were State's Exhibits 1A, 1B, 1C, and 1D in the trial court, were marked, identified, and admitted into evidence over Osborne's objection in the State's case in chief. (J.A. 9-11; R.52, 69, 73).

State's Exhibits 1A through 1C were Polaroid photographs, and State's Exhibit 1D had the notation on the back of the photograph of "Tommy - 13". (J.A. 9, 11).

State's Exhibits 1A through 1C depict the same young male child on a bed in various poses, which child Osborne stated was 14 years of age when the photographs were taken. (J.A. 13, 14,16).

In State's Exhibit 1A the 14 year old boy is depicted laying on his back in a provocative pose in a bed with his legs spread apart, and with an erect penis that Osborne described as a "hard on" (J.A. 20). The boy is holding something in his hand that Osborne described as electri-

cal, with a cord attached to it. (J.A. 20).

State's Exhibit 1B depicts the same 14 year old boy in an almost gymnastic pose on the bed with his hands behind his head and his arms looped between the inner part of the knee with his stretched and exposed anus in graphic focus.

In State's Exhibit 1C this 14 year old boy is depicted on the bed with his legs spread-eagled and in one of his hands placed into his anus is an item Osborne identified as a "dildo", but noted that "you can't tell from the picture whether there's any penetration." (J.A. 21). On the bed in this shot is the same electrical device shown in State's Exhibit 1A that Osborne said looks like a sander. (J.A. 21).

State's Exhibit 1D is a photograph of a different boy who is standing with his hands placed on his hips and a graphic focus on the male genitals. This photograph depicts the boy only between the shoulders and the knees. (J.A. 9). On the back of this Exhibit is the notation "Tommy - 13". (J.A. 9, 19). The background in this photo matches the background in the three Polaroid photos of the 14 year old boy.

Osborne obtained these four photographs from Jack Smith, the principal in Century Twentieth Studios, who had taken the photos and personally delivered them to Osborne in Columbus. (J.A. 17). Osborne did not know if the photos were taken in Florida or Ohio, "They could have been taken anyplace" because Smith used to travel around the country with a circus. (J.A. 18).

Osborne did not know the young boys in these photographs, and he was not their parent or ward. (J.A. 22).

Osborne mounted these four photos in his brown photo album, kept these photographs for at least three years, and periodically looked at them. (J.A. 15-16).

Neither at the time of his arrest nor during his testimony at trial, and in this court, did Osborne or his counsel claim that these four photographs contained serious literary, scientific, artistic or social value, or that they were possessed for a bona fide statutory purpose. Osborne and his counsel did not claim that the photographs communicated "information and ideas" or were possessed to "satisfy his intellectual and emotional needs".

The Jury in this case did not take long to find Osborne guilty of violating Section 2907.323(A)(3), Ohio Revised Code.

The trial judge imposed a sentence of six months, (J.A. 23), and the intermediate Ohio Court of Appeals, Tenth District, affirmed Osborne's conviction and sentence. (J.A. 25-34).

The Tenth District Ohio Court of Appeals certified their judgment to the Ohio Supreme Court as in conflict with a judgment of the First District Ohio Court of Appeals. The case was certified by the Ohio Court of Appeals on the *Stanley* v. *Georgia* 394 U.S. 557 (1969) issue regarding prohibiting private possession of child pornography.

In the interim, while Osborne's case was pending, the Ohio Supreme Court heard and decided *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986), the First District Court of Appeals case, and held that the child pornography possession statute did not violate the First Amendment.

Two other child pornography possession convictions were summarily affirmed on the same day as the *Meadows* decision. See *Ohio* v. *Modeen* 28 Ohio St. 3d 64, 502 N.E. 2d 634 (1986), and *Ohio* v. *Robinson* 28 Ohio St. 3d 65, 502 N.E. 2d 634 (1986).

Although the *Stanley* issue which had been certified had already been decided in favor of the State in the above cited cases, the Ohio Supreme Court considered that and the remaining issues presented by Osborne and affirmed his conviction *sub nom Ohio* v. *Young* 37 Ohio

St. 3d 249, 525 N.E. 2d 1363 (1988). (J.A. 37-54).

The Ohio Supreme Court re-affirmed its holding in *Meadows*, which involved possession of child pornography under another statute, Section 2907.322(A)(5), Ohio Revised Code, and applied the same reasoning to Section 2907.323(A)(3), Ohio Revised Code, the statute under which Osborne was convicted. (J.A. 39- 40).

Regarding Osborne's claim that the statute was vague and overbroad, the Ohio Supreme Court applied the "substantial overbreadth" doctrine from *Broadrick* v. *Oklahoma* 413 U.S. 601(1973), and found that the statute was "not constitutionally infirm on the basis of overbreadth". (J.A. 42).

In considering Osborne's claim that the term "nudity" was overbroad, consistent with *Ferber* and the Ohio statutory scheme that regulates the production, distribution, and possession of child pornography, the Ohio Supreme Court construed Section 2907.323(A)(3), Ohio Revised Code, to apply "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals". (J.A. 37).

Not surprisingly, the Ohio Supreme Court accorded the term "minor" its ordinary, common, and everyday meaning of a person under the age of eighteen. (J.A. 37).

Against Osborne's claim that the statute does not provide for scienter, the Ohio Supreme Court followed an Ohio statute and a long series of Ohio cases in holding that the relevant culpable mental state was "recklessness". (J.A. 37, 44).

Although a jury charge on recklessness was neither requested by Osborne, nor the charge objected to in this regard, the Ohio Supreme Court applied the "plain error" doctrine and found that Osborne "would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand" (J.A. 46- 47).

The Ohio Supreme Court affirmed Osborne's conviction, denied a motion for rehearing, and granted a stay pending appeal to this court. (J.A. 35, 55, 56).

This Court noted probable jurisdiction on June 26, 1989, 492 U.S. ____ , 106 L.Ed. 563, and the matter is before the Court on the merits.

SUMMARY OF ARGUMENT

The State of Ohio has a comprehensive statutory scheme that regulates the production, distribution, and possession of child pornography. (See Section 2907.321, *et seq.*, Ohio Revised Code.)

Ohio has a compelling interest in protecting children from sexual abuse and exploitation, including the circulation and possession of the "permanent record" of the sexual exploitation in the underground pedophile market that has developed since this Court's decision in *Ferber*.

The legislators in Ohio, and eighteen other states, have reasonably concluded that a possession statute is necessary to avoid that harm and to "dry up" the last and most important link in the underground chain of distribution of child pornography and to serve the compelling interest of protecting children from further harm.

Stanley v. *Georgia* 394 U.S. 557 (1969) held that there is a First Amendment fundamental right and liberty to privately possess obscene material.[1] Stanley was based on the principle that the First Amendment protects the right to "receive information and ideas, regardless of their social worth, which is *fundamental* to our free society." *Id.* at 564. (Emphasis added)

Ohio submits that *Stanley* is not applicable in this case because Osborne does not have a fundamental right or liberty to possess child pornography that is "deeply rooted in this nation's history and tradition", *Moore* v.

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[1]Osborne has not premised his privacy claims upon either the Fourth or Ninth Amendments, but solely upon the First Amendment, both in the Ohio courts and the jurisdictional statement in this court. Ohio will only address this issue in the First Amendment context because the *Stanley* "decision was firmly grounded in the First Amendment", *Bowers* v. *Hardwick* 478 U.S. 186, 195 (1986), and not the Fourth, Ninth, or Fourteenth Amendments.

East Cleveland 431 U.S. 494, 503 (1977) or is such a fundamental right "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed". *Palko* v. *Connecticut* 302 U.S. 319, 325 (1937).

Stanley, itself, and this Court more recently in *Bowers* v. *Hardwick* 478 U.S. 186, 195 (1986), recognized that otherwise illegal conduct is not immunized or beyond the pale of state regulation merely because the conduct occurred within the confines of the offenders home.

In *Stanley*, *supra* at 568 n.11 the Court said that its decision did not infringe on the states power to criminalize private possession of narcotics, firearms, or stolen goods, "nor do we mean to express any opinion on the statutes making criminal possession of other types of printed, filmed, or recorded materials." The court went on to say, "In such cases *compelling reasons* may exist for overriding the right of the individual to possess those materials". Id. 568 n. 11. (Emphasis added) Such compelling reasons exist regarding private possession of child pornography.

The fundamental right to "read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home", *Stanley*, supra at 565, does not extend an unrestricted right to privately possess child pornography.

Given that Osborne does not have a fundamental right or liberty to privately possess child pornography, Ohio's compelling interest in protecting its children from the scars of past sexual abuse, and preventing future sexual abuse, far outweigh whatever rights of Osborne that are presumptively implicated in this First Amendment equation.

In *New York* v. *Ferber* 458 U.S. 747 (1982) this Court held that child pornography was not protected speech under the First Amendment. However, the fact that child

pornography is not protected speech under the First Amendment is not enough to support the State's possessory offense, because obscene material also is not protected speech and *Stanley* precluded criminalizing private possession of obscene material.

What distinguishes Osborne from *Stanley* is the compelling State interest "of surpassing importance", *Ferber*, *supra* at 757, to protect and prevent harm to children from sexual abuse and exploitation which are inherent in the production, distribution, possession, and use of child pornography.

The asserted interest of Georgia in *Stanley* "to protect the individuals mind from the effects of obscenity", Id. at 565, pales by comparison with Ohio's interest in protecting children from sexual exploitation, which interest is "evident beyond the need for elaboration". *Ferber*, *supra* at 756.

Production and distribution statutes do not attack the last link in the chain of the child pornography market-at home possession and use of child pornography. Possession statutes are narrowly tailored to serve the State's interest of protecting children by breaking that last link in that chain and "drying up" the child pornography market, which has been driven underground since *Ferber*. In addition, besides the harm to children by continued possession of the permanent record of child sexual abuse, those who possess child pornography use that material to facilitate the seduction of other children to engage in sexual activity. *Attorney General's Commission on Pornography*, Final Report (July, 1988).

Ohio asserts that the State interests served by a possession statute far outweigh whatever First Amendment right Osborne has to private possession of unprotected material under *Stanley*.

In addition to *Stanley*, Osborne claims a First Amendment violation because the Ohio statute regulates nude

minors involved in lewd exhibitions or graphic focus on the genitals.

The New York statute upheld in *Ferber* defined sexual conduct to include a "lewd exhibition of the genitals". As stated in *Ferber* itself, "the term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation" Id. at 765. Child pornography which involves a "lewd exhibition or graphic focus on the genitals" is not substantially overbroad, has not been given an expansive construction by Ohio, and "whatever overbreadth may exist should be cured through case-by-case analysis". *Broadrick* v. *Oklahoma* 413 U.S. 601, 615 (1973).

Finally, Osborne contends that applying the Ohio statute to him as authoritatively construed by the Ohio Supreme Court violates the due process clause of the Fourteenth Amendment due to its pre-construction vagueness and overbreadth.

The legislative intent of the Ohio statutory scheme regulating child pornography is clear and the authoritative construction of nudity to a lewd exhibition or graphic focus on the genitals was foreseeable. This Court has long held in such situations that the statute, as construed, "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants." *Massachusetts* v. *Oakes* 491 U.S. ___, 105 L.Ed. 493, 502 (1989), citing *Dombrowski* v. *Pfister* 380 U.S. 479 491 n. 7 (1965).

Because the statutory scheme is not void for vagueness, and the construction was foreseeable with fair warning, its application to Osborne does not offend due process.

I. *Stanley*

A. Introduction

When *Stanley* v. *Georgia* 394 U.S. 557 (1969) was decided by this Court the problem of child pornography had not yet become the scourge upon this nation that it is today.[2]

It is only "In recent years, [that] the exploitive use of children in the production of pornography has become a serious national problem." *New York* v. *Ferber* 458 U.S. 747, 749 (1982).

The United States Congress found that "[c]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale"[3], and reacted by adopting The Protection of Children From Sexual Exploitation Act of 1977.[4] As noted in *Ferber*, most states also enacted statutes prohibiting production and distribution of child pornography. Id. 749.

In these early stages of combatting the problem, most statutes required that children not only be involved, but that the material itself fit the legal definition of obscenity under *Miller* v. *California* 413 U.S. 15 (1973). It was at that time that Ohio enacted Section 2907.321, Ohio Revised Code, that prohibits the production, advertisement, or distribution of obscene material that has a minor as

[2]The 1970 Report of the Commission on Obscenity and Pornography did not document a child pornography problem, and noted that "the taboo against pedophilia... has remained almost inviolate". Id. at 139.

[3]S. Rep. No. 95-438 p. 5 (1977); *New York* v. *Ferber* 458 U.S. 747, n.1 (1982).

[4]P.L. 95-225, 92 Stat. 7 (1978), 18 U.S.C.S. §§2251 et seq. (1979). Both the New York Statute at issue in *Ferber* and the Child Protection Act included "lewd exhibition of the genitals" by minors within the definition of child pornography.

one of its participants.[5]

Thereafter, exercising "greater leeway in the regulation of pornographic depictions of children", *Ferber*, *supra* at 756, twenty states prohibited the distribution of child pornography without the requirement that the material be obscene. Id. 749.

In *Ferber*, this court recognized and classified child pornography as a category of material without First Amendment protection. As a result of *Ferber*, Congress and the states either removed the obscenity requirement from existing statutes or enacted additional statutes involving child pornography that did not require that the material be obscene. Congress enacted The Child Protection Act of 1984, both removing the obscenity requirement and that the trafficking be for commercial purposes.[6]

The legislative response to the child pornography problem, and the *Ferber* decision, had driven the child pornography market underground and into a non- commercial market of pedophiles who bartered, traded, exchanged and sold the material among themselves.[7]

As a final response to this problem, with increasing information available that child pornography is used by pedophiles to seduce other children into sexual activity,[8]

[5]Section 2907.321, Ohio Revised Code, is set forth in its entirety in the Appendix.

[6]P.L. 98-299, 98 Stat. 204 (1984), still codified at 18 U.S.C.S. §§2251 *et seq*. In addition, the word "lascivious" was substituted for the word "lewd" regarding exhibition of the genitals or pubic area.

[7]Attorney General's Commission on Pornography, Final Report (1986), Chapter 11 entitled "Child Pornography", p. 133,150.

[8]K. Lanning, Collectors, in Child Pornography and Sex Rings (A. Wolbert Burgess Ed. 1984) p. 86; U.S. Dept. of Justice, Federal Bureau of Investigation, Child Molesting: A Behavioral Analysis for Law Enforcement, (1986), p.61; Attorney General's Commission on Pornography, Final Report (1986), Chapter 11 Entitled "Child Pornography" p. 138, 150; K. Lanning, Child Molesters: A Behavioral Analysis (2nd Ed. 1987).

and to "dry up" the last link in the underground chain of distribution for child pornography, Ohio and eighteen other states across the nation have criminalized the possession of child pornography.[9] Ohio's child pornography possession statutes are codified in Sections 2907.322 and 2907.323, Ohio Revised Code.[10]

When Osborne and others have been charged under those possessory statutes they have claimed that the First Amendment to the United States Constitution and *Stanley* v. *Georgia* 394 U.S. 557 (1969) protect the fundamental right and liberty to privately possess child pornography.

State Court decisions, federal court opinions, and legal commentators on this issue have all unanimously concluded that the State's compelling interest in protecting it's children from sexual abuse and exploitation far outweigh whatever rights are presumptively implicated

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[9]Alabama - §13A-12-192 (1984), Code of Alabama; Arizona - §13-3553 (1983), Arizona Revised Statutes; Colorado - §18-6-403 (1988), Colorado Revised Statutes; Florida - §827.071 (1985), Florida Statutes; Georgia - §16-12-100 (1987), Code of Georgia Annotated; Idaho - §18-1507 (1987), Idaho Code; Illinois - §11-20.1 (1985), Illinois Revised Statutes; Kansas - §21-3516 (1986), Kansas Statutes Annotated; Minnesota - §617.247 (1983), Minnesota Statutes; Missouri - §573.037 (1987), Missouri Revised Statutes; Nebraska- §28-809 (1988), Revised Statutes of Nebraska; Nevada - §200.730 (1983), Nevada Revised Statutes; Ohio - §2907.322 and §2907.323 (1984), Ohio Revised Code; Oklahoma - §1021.2 (1984), Oklahoma Statutes; South Dakota - §22-22-23-1, 22-22-23.1 (1988), South Dakota Codified Laws Annotated; Texas - §43.26 (1985), Texas Penal Code Annotated; Utah - §76-5a-3(1)(a) (1988), Utah Code Annotated; Washington - §9.68A.070 (1984), Revised Code of Washington; West Virginia - §61-8C-3 (1988), West Virginia Code.

[10]Sections 2907.322 and 2907.323, Ohio Revised Code, are set forth in their entirety in the Appendix.

under the First Amendment and *Stanley*.[11]

B. The First Amendment and *Stanley* v. *Georgia* 394 U.S. 557 (1969) do not confer a fundamental right to private possession of child pornography.

This Court stated in Stanley:

> Our holding in the present case turns upon the Georgia statute's infringement of *fundamental liberties* protected by the First and Fourteenth Amendments. *Stanley*, *supra* at 568 n.11.

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[11]*Ohio* v. *Young* and *Osborne* 37 Ohio St. 3d 249, 525 N.E. 2d 1363 (1988), *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986) cert. den. 480 U.S. 936, *Ohio* v. *Modeen* 28 Ohio St. 3d 64, 502 N.E. 2d 634 (1986); *Ohio* v. *Robinson* 28 Ohio St. 3d 65, 502 N.E. 2d 634 (1986); *Ohio* v. *Stover* 25 Ohio Bar Reports 349 (1985); *Illinois* v. *Geever* 122 Ill. 2d 313, 522 N.E. 2d 1200 (1988), dismissed for want of jurisdiction 102 L.Ed 2d 319 (1988); *Felton* v. *Alabama* 526 So.2d 635, aff'd 526 So.2d 638 (1988); *Washington* v. *Davis* 53 Wash. App. 502, 768 P.2d 499 (1989); *Savery* v. *Texas* 767 S.W.2d 242 (1989); *Illinois* v. *Johnson* Case No. 1-88-0867 (Appellate Court of Illinois, First District, 2nd Div.) 1989 Westlaw 76285 (1989); *Florida* v. *Beckman* (District Court of Appeal, 5th District) 14 Fla.L.Week 1621,1989 Westlaw 72746 (1989); *United States* v. *Andersson* 803 F.2d 903 fn. 3 (7th Cir. 1986), cert den. 479 U.S. 1069; *United States* v. *Boffardi* 684 F.Supp. 1263, 1267 (S.D.N.Y. 1988); *United States* v. *Mercado* Case No. 86-1872 (6th Circuit 1987), Unpublished decision 828 F.2d 20, text in Westlaw; "Validity and Construction of 18 U.S.C.S. §§371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography" 86 A.L.R. Fed. 359, 368 (Lawyers Co-operative Publishing Co. 1988); Stanley + Ferber = the constitutional crime of at-home child pornography possession, Josephine R. Potuto, 76-Ky. L.J. 15 (1987-1988). Cf. *Illinois* v. *Spargo* 431 N.E.2d 27 (1982); *New York* v. *Godek* 449 N.Y. Supp. 2d 428 (1982); *United States* v. *Miller* 776 F.2d 978 (11th cir. 1985), cert den. 475 U.S. 1129.

For the appellant to prevail herein, this court must conclude that there is a "*fundamental right*" to possess child pornography in the privacy of the home, which right is secured by the First and Fourteenth Amendments to the United States Constitution. Suffice it to say that such a right is not explicitly secured by the above amendments. However, in a series of cases the court has held that certain rights are so fundamental to freedom and liberty that they are beyond the pale of state regulation. *Pierce* v. *Society of Sisters* 268 U.S. 510 (1925), and *Meyer* v. *Nebraska* 262 U.S. 390 (1923) were described as dealing with child rearing and education; *Prince* v. *Massachusetts* 321 U.S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma* 316 U.S. 535 (1942) with procreation; *Loving* v. *Virginia* 388 U.S. 1 (1967) with marriage; *Griswold* v. *Connecticut* 381 U.S. 479 (1965) and *Eisenstadt* v. *Baird* 405 U.S. 438 (1972) with contraception; and *Roe* v. *Wade* 410 U.S. 113 (1973) with abortion. A more recent case decided by the court is *Bowers* v. *Hardwick* 478 U.S. 186 (1986), which held that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy in the privacy of their home.

Accepting these cases at face value, it is clear that none of the fundamental rights announced therein bears any resemblance, or supports, a claim to a fundamental right to possess child pornography in the privacy of the home. Indeed, if anything, *Bowers* v. *Hardwick*, *supra* supports the position of the State on that issue.

The fundamental rights from the Constitution that are not explicit therein have been characterized as those liberties that are "deeply rooted in the nation's history and tradition", *Moore* v. *East Cleveland* 431 U.S. 494, 503 (1977), or those fundamental liberties that are "implicit in the concept of ordered liberty", such that "neither

liberty nor justice would exist if [they] were sacrificed." *Palko* v. *Connecticut* 302 U.S 319, 325, 326 (1937).

Quoting from *Bowers* v. *Hardwick*, *supra*, the court's observations with respect to *Stanley* are equally applicable herein:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.* at 568, n 11. And if respondents submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. *We are unwilling to start down that road.* (Emphasis added.) *Bowers* v. *Hardwick*, *supra* at 195-196.

Thus, the State of Ohio contends that because a "fundamental right" is not involved, that *Stanley* v. *Georgia*, *supra* does not confer a right secured by the First Amendment to privately possess child pornography in the home.

C. The State has a compelling interest of surpassing importance in prohibiting private possession of child pornography.

Should the court find that Osborne has a fundamental right under the First Amendment "to be free from state inquiry into the contents of his library", *Stanley*, *supra* at 565, of child pornography in the privacy of his home, that does not end the inquiry.

Stanley itself said:

> Nor do we mean to express any opinion on statutes making criminal possession of *other types of printed, filmed or recorded materials*. See eg., 18 U.S.C. §793(d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation..." *In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials*.

Stanley, supra at 568 n.11. (Emphasis added).

Osborne claims that the State interest in prohibiting private possession of child pornography is no greater than the interest in prohibiting private possession of obscene material.

Ohio disagrees, and submits that compelling reasons exist to override whatever First Amendment right may exist for Osborne to privately possess child pornography.

1. Prohibiting private possession of child pornography protects children and prevents further underground circulation and distribution of the permanent record of child sexual abuse.

The same compelling interests identified by the Court in *Ferber* to justify a child pornography distribution statute are supported and served by Ohio's possession statute.

As stated by the Court, "[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child". *Ferber, supra* at 758.

When such performances are recorded, distributed and *possessed* the child's privacy interests are invaded. While "[t]he materials produced are a permanent record of the

children's participation and the harm to the child is exacerbated by their circulation", Id. 759, this harm does not end with the sale or distribution of the material but continues while that permanent record is possessed by the pedophile, even if the possession is in the privacy of the home.

The photographs possessed by Osborne of that 14 year old boy depicted in State's Exhibits lA, lB, and lC continue to exploit and victimize him "because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place." *Ferber*, supra at 759 n.10. Possession of those photographs by Osborne violates that child's "individual interest in avoiding disclosure of personal matters." Id., citing *Whalen* v. *Roe* 429 U.S. 589, 599 (1977).

Both intuitively, and based on work with child pornography and sex abuse victims "experts seem to agree that a child depicted in pornography suffers injury not only from participation in the sexual activity *but also by having to deal with the existence of an always available permanent record*". (Emphasis added) *Stanley + Ferber = The constitutional crime of at-home child pornography possession*, Josephine Potuto, 76 Ky. L.J. 15 (1987- 88) (hereinafter *Potuto*).

The state interest and the authorities relied upon by the *Ferber* court are equally applicable and compelling reasons to justify a possession statute in terms of the harm caused to children by possession of the permanent record of sexual abuse by those in the underground child pornography market.

2. Prohibiting private possession is necessary to dry up the last and most important link in the child pornography market.

Consistent with this court's direction that "States are

entitled to greater leeway in the regulation of pornographic depictions of children", *Ferber*, *supra* 756, the Ohio General Assembly concluded that the adoption of a child pornography possession statute was necessary to "dry up" the last and most important link in the chain of the child pornography market.

Not only Ohio, but eighteen other states, have "determined that it is necessary to prohibit possession of such materials in order to halt sexual exploitation and abuse of children". *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 51; 503 N.E.2d 697, 704 (1986). See also *Illinois* v. *Geever* 122 Ill. 2d 313, 522 N.E. 2d 1200, 1206 (1988), app. dism. 102 L.Ed. 319. ("The legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography.")

As this court noted in *Ferber*, *supra* at 759 "[t]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."

With the enactment of production and distribution statutes and the *Ferber* decision, much of the child pornography market has been driven underground, and contrary to Osborne's assertion, is non-commercial.[12]

While it was "difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce" child pornography at the time *Ferber* was decided, Id. 759- 760, the stark reality is that it is now equally difficult, if not impossible, to address and solve this problem that has gone underground by only attacking production and distribution.

Child pornography is produced and distributed, and

[12]Attorney General's Commission on Pornography, Final Report, Chapter 11, entitled "Child Pornography", p. 133; Potuto, *supra* at 44, n.124.

more often homemade as in Osborne's case, because pedophiles desire to possess and use the material. Production of child pornography will continue, with the attendant grave harm caused to children through its production, as long as there is a pedophile market for such material. *Illinois* v. *Geever*, supra at 1206.

No one, including both New York police detectives and Osborne, can any longer walk into Paul Ferbers Adult bookstore in Manhattan and purchase child pornography. For that reason, the focus of law enforcement must include possession of the material, as well as distribution, if the child pornography market is to be dried up.

In *Ferber*, this court found that "the only practical method of law enforcement may be to dry up the market for this material", Id. 760, and with the clandestine underground child pornography market, this can only be accomplished with the additional tool of a possession statute.

If the market can be dried up, further sexual exploitation of children through production will be prevented.

3. Child pornography possession statutes serve the compelling state interest of preventing further exploitation of children by use of the material to seduce other children into sexual activity.

In *Stanley*, Georgia was concerned with protecting "the individuals mind from the effects of obscenity." Id. 565.

Ohio seeks not to protect the possessor, but victims of the possessor.

One purpose of child pornography possession statutes, and a compelling interest of surpassing importance, is to protect other children from the pedophile who uses child pornography to seduce minors into engaging in sexual activity. That seduction process and sexual activity results in the production of further child pornography as a memorialization of the child sexual abuse.

This cycle of child sexual abuse, which includes the production and use of child pornography, is described as follows:

> While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.
>
> Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity. From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.
>
> A pedophile offender will use child pornography in which the children appear to be having a good time. The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.
>
> Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage. In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.
>
> Pornographic depictions of a child may be used to blackmail the child. The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.
>
> Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors. This subjects a child to repeated victimization of countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies. Child pornography which may have originated as a homemade item may eventually be sold to a commercial child pornography publication.[13]

The possession and use of child pornography in the manner outlined above provides a critical difference from the obscene material possessed by *Stanley*, which Georgia sought to protect him from, and the state's interest in this case.

By prohibiting private possession of child pornography, the State is depriving the pedophile of the "criminal tool", *Potuto*, 44-45, necessary to commit further child sexual abuse and produce additional child pornography. That "criminal tool" is subject to regulation under *Stanley*. Id. 568 n. 11.

The interests of the State in protecting its children who

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[13]Final Report of the Attorney General's Commission on Pornography, Chapter 11, Entitled "Child Pornography", P. 138, 150, footnotes omitted. See also K. Lanning, Collectors, in Child Pornography and Sex Rings (A. Wolbert Burgess Ed. 1984) p.86; U.S. Dept. of Justice, Federal Bureau of Investigation, Child Molesting: A Behavioral Analysis for Law Enforcement (1986) p.61; S. O'Brien, Child Pornography, 89, (1983); P. Campagna and D. Poffenberger, The Sexual Trafficking in Children, 118 (1988); Report of the Surgeon Generals Workshop on Pornography and Public Health, Office of Surgeon General, U.S. Dept. of Health and Human Services (Aug. 1986) p. 14; See *Amicus* Brief of Concerned Women for America, p. 12-17; Potuto, p. 44-45.

are potential child sexual abuse victims in this vicious cycle is different than the "antisocial conduct" that the *Stanley* court felt insufficient to support Georgia's statute.

First, unlike *Stanley*, as noted above, there is an empirical basis to support the State's claimed interest. Second, the suggested solution to this problem in *Stanley* was "education and punishment", Id. 567, citing *Whitney* v. *California* 274 U.S. 378 (1927). The child victim is not a likely candidate for education because "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Belloti* v. *Baird* 443 U.S. 622, 635 (1979). Thus, educating our children will not adequately address the prevention of further sexual exploitation through the use of child pornography. Education of the pedophile can only occur after identification and prosecution, through a treatment and rehabilitation process, yet at that time the harm is done to the child. In the alternative of seeking to punish the subsequent sexual exploitation, the State faces the same problems identified by the court in *Ferber*, supra at 760 n.11, as well as problems with child witnesses, competency to testify, parental resistance to prosecution due to a fear of further harm to the child by reliving the abuse, and lack of corroboration, which is essential in those type of cases. While "the need to ease the administration of otherwise valid criminal laws" did not override *Stanley's* fundamental rights, Id. 568, both the harm caused to past and potential child sex abuse victims, and Osborne's lack of a fundamental right to possess child pornography, serve to distinguish *Stanley* in this regard.

Ohio submits that the prevention of further use of child pornography to victimize other children, a "secondary effect" of child pornography, is a compelling interest that

outweighs the value of permitting private possession.

D. The State's compelling interests outweigh any right to privately possess child pornography.

This court has repeatedly refused to extend *Stanley* beyond the narrow and specific facts of that case, with *Stanley* itself suggesting an exception where compelling reasons exist. See *United States* v. *12 200-ft. Reels* 413 U.S. 123, 127-128 (1973) (Stanley is to be viewed as "explicitly narrow and precisely delineated" and the Court was "not disposed to extend the precise, carefully limited holding of Stanley to importation of obscenity for private use); *United States* v. *Orito* 413 U.S. 139, 142 (1973) (Stanley not extended to use of mails to transport obscenity, even for private use); *United States* v. *Thirty-Seven Photographs* 402 U.S. 363 (1971) (Stanley not applicable to private transportation of obscene materials for commercial use); *United States* v. *Reidel* 402 U.S. 351 (1971) (no Stanley right to sell obscene material through the mails); *Paris Adult Theatre* v. *Slaton* 413 U.S 49, 66- 69 (1973) (no Stanley protection outside the home that follows the obscene material); *Bowers* v. *Hardwick* 478 U.S. 186 (1986) (no Stanley right to at home homosexual sodomy).

Osborne has taken the clearly defined and narrow *Stanley* right to private possession of obscenity and declared it absolute to its logical extreme by including the right to privately possess child pornography. "Yet all [rights] in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached" *Hudson Water* Co. v. *McCarter* 209 U.S. 349, 355 (1908).

Ohio submits that *Stanley* should not be extended to possession of child pornography. As this court noted in *United States* v. *12 200- ft. Reels* 413 U.S. 123, 127 (1973)

the seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. *Stanley* is a "line of demarcation", Id. 127, and is limited to in home possession of obscenity.

Its "logical extension" to child pornography is not warranted in light of the State's compelling interests to protect and nurture its children.

Osborne, who claims a "right to possess and view those photographs and to reap whatever message they may yield," Appellants Brief p. 32, is not the victim of a "governmental program of thought control". *United States* v. *Reidel* 402 U.S. 351, 359 (1971) (Harlan J., concurring).

Keeping in mind that Georgia sought to protect the individual's mind from the effects of obscenity, the State is not manipulating "the content of a man's mind" or the "mere possession of the memorabilia of a man's thoughts and dreams", Id. 359, but rather is seeking to protect children from the past and future harm inherent in child pornography.

When the crime, here possession of child pornography, "can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity", *United States* v. *Reidel* 402 U.S. 351, 359 (1971) (Harlan J., concurring), then Ohio submits that *Stanley* should yield.

This court has long recognized that "a democratic society rests, for its continuance, upon the healthy well rounded growth of young people into full maturity as citizens". *Prince* v. *Massachusetts* 321 U.S. 158, 168 (1944), and that "safeguarding the physical and psychological well being of a minor" is "compelling". *Globe Newspaper Co.* v. *Superior Court* 457 U.S. 596, 607

(1982). See also *Ginsberg* v. *New York* 390 U.S. 629 (1968), *FCC* v. *Pacifica Foundation* 438 U.S 726 (1978). Although the statute was not sufficiently narrow to achieve the interest involved, last term this court concluded that the government had a "compelling interest" in preventing minors from being exposed to non-obscene but indecent telephone messages. *Sable Communications* v. *FCC* 492 U.S. ___ 106 L.Ed 93, 108 (1989). Certainly, the protection of children from the harms of child pornography is also a compelling interest.

The single *Stanley* example of a compelling interest that may override the right of the individual to possess materials was the espionage statute, where the possessor had reason to believe the material could be used to the injury of the United States or the advantage of a foreign nation. *Stanley*, *supra* 568 n.11.

The safety and future security of this county is equally dependent upon our children being free from the scourge of child pornography as upon the detection and prosecution of foreign or internal espionage agents.

First Amendment rights are not absolute, and yield to compelling governmental interests in many contexts.[14] By virtue of *Ferber*, child pornography itself is outside the protection of the First Amendment.

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[14]See *Near* v. *Minnesota* 283 U.S. 697 (1931) (although cited generally for the proposition that the government cannot impose a prior restraint consistent with the First Amendment, the court noted that such a prior restraint may be justified in enjoining the publishing of the schedule of transport ships in the time of war), *Schenck* v. *United States* 249 U.S. 47 (1919) (where Justice Holmes famously noted that the First Amendment did not confer the right to yell fire in a crowded theater), *Brandenburg* v. *Ohio* 395 U.S. 444 (1969) (that criminal syndicalism and Sedition type statutes will be constitutional where there is a "clear and present danger" that unlawful and violent action is imminent and likely) *Chaplinsky* v. *New Hampshire* 315 U.S. 568 (1942) (verbal conduct may be punished if characterized as "fighting words");

Due to the great harm to children in the production, distribution, possession and use of child pornography, "compelling reasons... exist for overriding the right of the individual (Osborne) to possess those materials". *Stanley*, supra at 568, n.11. (Parenthetical material added.)

II. Child pornography includes a lewd exhibition or graphic focus on the genitals.

In this case, decided *sub. nom. Ohio* v. *Young* 37 Ohio State 3d 249, 525 N.E. 2d 1363 (1988) (J.A. 37- 54), the Ohio Supreme Court construed the term "nudity", consistent with the Ohio Statutory scheme on child pornography, to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals". (J.A. 37)

Osborne claims that Ohio may not, consistent with the First Amendment right of freedom of speech, prohibit the possession of child pornography which depicts minors in a state of nudity where that nudity constitutes a "lewd exhibition" or "involves a graphic focus on the genitals".

Osborne claims that this prohibition is overbroad because it encompasses materials protected by the First

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[14]continued

Westermann Co. v. *Dispatch Co.* 249 U.S. 100 (1919) (a court may issue an injunction against continued publications which violate the copyright law); *NLRB* v. *Gissell Packing Co.* 395 U.S. 575 (1969) (NLRB may enjoin the exercise of apparent First Amendment rights when they violate the National Labor Relations Act); *New York Times* v. *United States* 403 U.S. 713 (1971) (governments application to enjoin the publication of the Pentagon papers is denied because they have not carried their burden of justifying the imposition of a prior restraint, indicating that under compelling circumstances the government can sustain such a burden), *Posadas de Puerto Rico* v. *Tourism Co. Puerto Rico* 478 U.S. 328 (1986) (Puerto Rican ban on advertising legalized casino gambling is upheld).

Amendment, and it is not narrowly drafted to serve the compelling state interest of regulating nudity-oriented child pornography.

Ohio believes that this prohibition is not "substantially overbroad" and is narrowly drafted to serve the compelling state interest of regulating that type of child pornography that does not actually depict vaginal, oral, or anal sexual intercourse, but does depict minors involved in lewd exhibitions or graphic focus on the genitals in suggestive poses, such as State's Exhibit 1A, 1B, 1C, and 1D in Osborne's case.

A. The State may prohibit private possession of material that meets the definition of child pornography.

As demonstrated in the first part of this brief, a state may prohibit private possession of child pornography consistent with *Stanley*. Osborne has raised the additional issue as to whether or not the material possessed by him meets the definition of child pornography from *New York* v. *Ferber* 458 U.S. 747 (1982). Ohio submits that the type of photographs possessed by Osborne in this case, photographs which depict a lewd exhibition or graphic focus on the genitals of minors, fit the definition of child pornography and are without First Amendment protection.

B. A visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals is within the definition of child pornography under *New York* v. *Ferber* 458 U.S. 747 (1982).

The New York statute upheld by this court in *Ferber* prohibited a "sexual performance" which included "sexual conduct" by a minor.

The term "sexual conduct" was defined in New York law to include a "lewd exhibition of the genitals". Id. 750.

This court posited the question in *Ferber* as to "whether a state has somewhat more freedom in proscribing works which portray sexual acts or *lewd exhibitions of genitalia by children*" Id. 753.

In answering that question in the affirmative, the *Ferber* court immediately noted from *Chaplinsky* v. *New Hampshire* 315 U.S. 568 (1942) that "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd* and obscene." (Emphasis added) Id. 754.

In discussing the reasons why the regulation of child pornography was without First Amendment protection, the court stated "the value of permitting live performances and photographic reproductions of children engaged in *lewd* sexual conduct is exceedingly modest, if not *de minimis*". Id. 762. (Emphasis added)

With respect to a question regarding the overbreadth of that New York statute, this court said "the term *'lewd exhibition of the genitals'* is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation". Id. 765. (Emphasis added)

While noting that nudity, without more, is protected expression, this court, and the Ohio Supreme Court in this case, carefully distinguished between mere nudity and nudity involving children which was posed with a graphic focus on the genitals or depicted minors engaging in a lewd exhibition.

Ohio urges each member of this court to view the four photographs contained in the record in this case and make an independent determination whether those photographs depict "mere nudity" or indeed depict the type of lewd exhibition of the genitals that the court was addressing in *Ferber* when the New York statute was upheld. For that reason, the statute is not substantially overbroad on its face as construed by the Ohio Supreme

Court, or as applied to Osborne.

As noted previously, The Protection of Children From Sexual Exploitation Act of 1977 defined the phrase "sexually explicit", as it relates to child pornography, to include a "lewd exhibition of the genitals or pubic area". This definition of "sexually explicit" conduct was adjusted slightly in the Child Protection Act of 1984 where the first word was changed from "lewd" to "lascivious".[15]

Prior to its amendment, at least one federal court found that the term "lewd exhibition" of the genitals was sufficiently clear that anyone with a modicum of common sense and knowledge of the English language and human nature could understand what was prohibited. *United States* v. *Nemuras* 567 F.Supp. 87 (D. Md. 1983).

Since "there are limitations in the English language with respect to being both specific and manageably brief", *United States Civil Service Commission* v. *National Association of Letter Carriers* 413 U.S. 548, 578 (1973), the terms "lewd exhibition or graphic focus on the genitals" with respect to child pornography are not unconstitutionally vague or overbroad.

The "substantial overbreadth" doctrine from *Broadrick* v. *Oklahoma* 413 U.S. 601 (1973), as utilized in *Ferber*, with respect to a lewd exhibition or graphic focus on the genitals in child pornography applies with equal force in this case. Ohio has not given an expansive construction to this proscription, and whatever overbreadth may exist "should be cured through case-by-case analysis" as suggested in *Broadrick*, *supra* at 615-616. See also *Massachusetts* v. *Oakes* 491 U.S. ___ , 105 L.Ed 493, 505 (1989) (Scalia J., concurring in the judgment and dissenting in part).

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[15]This amendment was described as "only technical", See 1984 U.S. Code Cong. & Ad. News 492, 499. *United States* v. *Meyer* 802 F.2d 348 (9th Cir. 1986) (where indictment upheld that alleged "lewd" where conduct was after statutory amendment to "lascivious".)

To constitute child pornography under *Ferber* the material must involve a visual depiction of children below a specified age engaged in sexual conduct. Id. 764. There also must be "some element of scienter" on the part of the defendant. Id. 765.

Section 2907.323(a)(3), Ohio Revised Code, as construed by the Ohio Supreme Court, meets these tests from *Ferber*. The visual depiction of a minor under age eighteen, with a mental state of recklessness, must involve a lewd exhibition or graphic focus on the genitals to violate the statute.

C. The Ohio statute that prohibits possession of photographs of a nude minor child that involve a lewd exhibition or graphic focus on the genitals is not vague or overbroad.

Although Ohio courts have not specifically defined the terms "lewd exhibition or graphic focus on the genitals" the purpose of the statute is clear, and the terms certainly have precedence both in obscenity and child pornography law. One court in addressing the relevant factors of a "lascivious exhibition of the genitals or pubic area" under the federal statute looked to the following factors as relevant:

1. Whether the focal point of the visual depiction is on the child's genitalia or pubic area.
2. Whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity.
3. Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child.
4. Whether the child is fully or partially clothed or nude.
5. Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.
6. Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. *Dost* 636 F.Supp. 828, 832 (S.D. Cal. 1986), Aff'd *Sub nom United States* v. *Wiegand* 812 F. 2d 1239 (9th Cir. 1987). On appeal, in *Wiegand, supra*, at 1244, the court noted that

the standard employed by the district court was over-generous to the defendant in implying as to the seventeen year old girl that the pictures would not be lascivious unless they showed sexual activity or willingness to engage in it. The offense defined by the statute is depiction of a 'lascivious exhibition of the genitals'. Plainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object... in the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles... that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur. Other courts have looked to the factors listed in *Dost, supra* with respect to a lascivious exhibition of the genitals. *United States* v. *Nolan* 818 F.2d 1015 n.5 (1st Cir. 1987)

The terms "lewd exhibition or graphic focus on the genitals", used by the Ohio Supreme Court in this case are equivalent to the definitions contained in the federal child pornography laws, and as noted in *Wiegand, supra*, the term "'lascivious' is no different in its meaning than 'lewd', a commonsensical term whose constitutionality was specifically upheld in *Miller* v. *California* 413 U.S. 15 (1973), and in *Ferber* 458 U.S. at 765 (1982)".

Next, Osborne seems to argue that *Ferber* requires

vaginal, oral, or anal intercourse involving children to qualify as child pornography, or at least some type of sex act. That simply isn't the case, and this court so stated in *Ferber*. The photographs in this case clearly reflect a lewd exhibition or graphic focus on the genitals. The federal law on the same subject uses nearly identical terminology. The Ohio statute does not criminalize mere "nudity" as alleged by Osborne. Considering the entire Ohio statutory scheme, the Ohio Supreme Court Opinion below, and the recognizable term "lewd exhibition of the genitals", which is a term that is "not unknown in this area", Id. 765, and is an example of permissible regulation in *Miller*, where the Ohio Supreme Court has not given an expansive construction to that term, the Ohio statute is not overbroad.

Next, Osborne claims that commercial distribution is a necessary requirement to fit the definition of child pornography. While it is true that *Ferber* was directed at commercial distribution of child pornography, the court's opinion in *Ferber* clearly indicates that a commercial purpose is not required, and indeed that is the reason the 1977 federal statute was amended to eliminate the commercial requirement that existed in the statute prior to *Ferber*.

Finally, with respect to overbreadth, Osborne contends that the Ohio statute is not narrowly tailored to serve a compelling state interest.

The state believes that it has sufficiently demonstrated that a compelling interest is served by prohibiting possession of child pornography. Merely because the materials do not depict actual vaginal, oral, or anal intercourse with a child, Osborne argues that no sexual abuse or molestation of a child has occurred. Surely sexual abuse and child abuse occur whenever a child is involved in a photograph depicting lewd exhibition or graphic focus on the genitals, such as in this case. Although there is no

sexual contact between the third person and the child, the gymnastic and lewd poses, together with the use of the dildo placed to the young man's anus, surely involves sexual exploitation.[16]

Next, Osborne contends that the Ohio statute is not narrowly tailored to protect children because certain exemptions are present in the statute. Those exemptions serve not to expand the scope of the statute to reach innocent or protected conduct, which is the essence of an overbreadth argument, but rather, those exemptions serve to limit the scope of the statute to regulate material that fits the definition of child pornography under the *Ferber* decision. Those exemptions, in fact, confirm that protected or innocent conduct is outside the scope of the statute. An overbreadth attack on the statute would not succeed even in the absence of those exemptions, but Ohio has chosen to make clear that it has not proscribed possession for bona fide and proper purposes, some of which were of concern to the court in *Ferber*. The parental exception that Osborne claims permits underinclusive regulation, serves to exclude from the statute the idea that it would "make a criminal out of a parent who takes a full frontal view picture of his or her naked one year old running on a beach or romping in a wading pool". *Massachusetts* v. *Oakes* 491 U.S. ___ , 105 L.Ed. 2d 493, 507 (1989) (Brennan J. dissenting). The "artistic purposes" exception in the statute addresses the concern of some members of the court, both in *Ferber* and *Oakes*. Contrary to Osborne's claim, these exceptions limit the scope of the statute to unprotected speech.

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[16] " Even if the child is photographed alone... the producers of the visual material often engage insexual activity with the child before and after photographing". *Note, protection of Children from use in pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich., J.L. Ref. 295, 300 and nn.35-36 (1979).

Finally, Osborne claims that the state has not chosen the least restrictive means by which to serve the interests of attacking child pornography. Ohio believes that a comprehensive statutory scheme which not only regulates production and distribution, but also possession, is the least restrictive means by which to serve its interests of preventing harm to children. The harm to children is documented in the *Stanley* portion of this brief as well as the reasons to extend that regulation to possession.

Section 2907.323, Ohio Revised Code, prohibits visual depictions of minors that involve a lewd exhibition or graphic focus on the genitals, which as construed by the Ohio Supreme Court, is not substantially overbroad, serves a compelling state interest, and is narrowly tailored to protect children from the harm inherent in the production, distribution, possession, and use of child pornography.

III. Construction of Section 2907.323, Ohio Revised Code.

Osborne claims that the authoritative construction of Section 2907.323, Ohio Revised Code, by the Ohio Supreme Court in this case, which resulted in affirming his conviction, is a retroactive application of a facially invalid and overbroad statute, which application is prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.

Ohio respectfully submits that the statutory scheme regulating production, distribution, and possession of child pornography gave fair notice of the conduct proscribed, was not vague or overbroad, and that the authoritative construction of the term "nudity" to a lewd exhibition or graphic focus on the genitals was foreseeable. In such a situation, the statute as authoritatively construed may be applied to conduct which occurred prior

to that construction, provided such application affords fair warning to the defendant, which in this case it did.

A. The Ohio Supreme Court authoritatively construed Section 2907.323, Ohio Revised Code.

Osborne claims that the Ohio Supreme Court substantially "rewrote" Section 2907.323, Ohio Revised Code, and performed "plastic surgery". A fair reading of Sections 2907.321, 2907.322, and 2907.323, Ohio Revised Code, and the Ohio Supreme Court's Decision in this case, belies Osborne's claim.

While Osborne makes much ado about the treatment of scienter, the term "minor", and dicta in the Ohio Supreme Court decision, none of those characterizations are accurate.

The applicability of the mental state of "recklessness", pursuant to an Ohio statute, has been well established Ohio law. Section 2901.21(B), Ohio Revised Code, provides, in pertinent part, with respect to criminal offenses that "when the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." This Ohio statute was enacted in 1974. This Section has been construed by the Ohio Supreme Court on at least two occasions prior to Osborne's offense where it applied the mental state of recklessness to a statutory offense. *State* v. *Adams* 62 Ohio St. 2d 151, 404 N.E. 2d 144 (1980) (applicable to child endangering statute); *Ohio* v. *Parrish* 12 Ohio St. 3d 123, 465 N.E. 2d 873 (1984) (applicable to prostitution offenses). See also *Ohio* v. *McGhee* 12 Oh. Misc. 2d 18, 468 N.E. 2d 400 (1984). The Ohio Supreme Court did not "rewrite" the child pornography possession statute as alleged by Osborne, but rather, merely applied a fifteen year old Ohio statute that had been applied in similar occasions in the past to other

criminal offenses. That application to Osborne in this case was not retroactive, he had fair notice of both the statutory provision and Ohio Supreme Court interpretations of that statute prior to his offense, and its application to the child pornography statute under which he was charged was foreseeable.

With regard to the construction of the term "minor", again, the appellant has exaggerated this claim. In addressing this issue, we start with the "fundamental canon... that... unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States* 444 U.S. 37, 42 (1979). This precept is reiterated in Section 1.42, Ohio Revised Code, that provides that any term left undefined by statute is to be accorded its common, everyday meaning. The ordinary dictionary definition of minor is one who has not yet reached the age of majority. *Webster's Collegiate Dictionary*, 727 (G. & C. Merriam Company, 1981). Section 3109.01, Ohio Revised Code, entitled Age of Majority, provides that "all persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes." See also *Black's Law Dictionary*, 899 (5th Ed. 1979) ("in most states, a person is no longer a minor after reaching the age of eighteen") Section 1339.31(K), Ohio Revised Code, that specifically defines the term "minor" to mean a person who has not attained the age of eighteen years in connection with The Gifts to Minors Act; and the substantially equivalent term "juvenile", which is defined in Section 2907.01(I), Ohio Revised Code, to mean an unmarried person under the age of eighteen. The applicable age is eighteen in all of the references above.

Taken together, it is clear that the Ohio statute prohibited the possession of child pornography that depicted a minor who was under the age of eighteen. Contrary to ap-

pellant's claim, the Ohio Supreme Court did not "rewrite" the statute to achieve its determination that the child pornography possession statute applied to children under the age of eighteen, but merely accorded that term its common, ordinary, and everyday meaning. [17]

Finally, Osborne claims that the Ohio Supreme Court added "elements" to the statutory offense and retroactively applied these new elements to his conviction. In Ohio, both by statute, Section 2503.20, Ohio Revised Code, and by court decision, *Cassidy* v. *Glossip* 12 Ohio St. 2d 17, 231 N.E. 2d 64, (1967), the "syllabus" of an Ohio Supreme Court decision is the law of the case, not the opinion or decision rendered in the case. Osborne focuses on *dicta* in Justice Douglas' opinion for the proposition that additional elements were added to the offense. Ohio disagrees with this characterization. The term minor was merely accorded its common, every day, and normal meaning. Section 2901.21(B), Ohio Revised Code, which has been in effect for fifteen years, was applied as the culpable mental state in accord with multiple Ohio Supreme Court cases decided prior to Osborne's conduct. Appeal to a prurient interest was not added as an element, but is only *dicta* in the opinion. Finally, considering the overall statutory scheme to regulate child pornography, and the exemptions therein, the Ohio Supreme Court accorded the term "nudity" the only appropriate, sensible, and constitutional meaning that could apply. These actions by the Ohio Supreme Court do not result in a retroactive application of Section 2907.323, Ohio Revised Code, to Osborne.

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[17] Interestingly enough, Osborne sought a jury instruction that the term minor in Section 2907.323, Ohio Revised Code, meant fifteen years of age. The uncontradicted evidence was that the boys depicted in the photographs possessed by Osborne were ages 13 and 14, below the age of minority as even Osborne construed that term.

B. The Ohio statutory scheme regulating child pornography provides fair warning of the conduct proscribed.

Osborne's principal claim is that the use of the term "nudity" in Section 2907.323, Ohio Revised Code, is unconstitutional as both vague and overbroad. Osborne then claims that because the Ohio Supreme Court authoritatively construed and narrowed the term "nudity" to apply to lewd exhibitions or graphic focus on the genitals, that such construction resulted in a retroactive application of that statute to him.

At the outset, Ohio would submit that when the Ohio statutory scheme regulating child pornography is considered on its face that it is neither vague nor overbroad. Sections 2907.321, 2907.322, and 2907.323, Ohio Revised Code, regulate the production, distribution, and possession of various types of child pornography. Considering those statutes together, their purpose is evident and clear. Ohio was overly solicitous of protected speech by providing the exemptions in those statutes for bona fide statutory purposes, and parental conduct.

Section 2907.323, Ohio Revised Code, even before it was authoritatively construed by the Ohio Supreme Court, was neither "impermissibly vague in all of its applications", *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 495 (1982), nor substantially overbroad, because its "legitimate reach dwarfs its arguably impermissible applications". *Ferber, supra* at 773.

Although the statute on its face purported to prohibit the possession of "nude" photographs of minors, the exemptions and proper purposes provisions substantially narrowed the statute. (J.A. 42) In addition, Osborne had fair notice that a narrowing construction of the term "nudity" was foreseeable.

In *Ohio* v. *Burgun* 56 Ohio St. 2d 354, 384 N.E. 255 (1978) the defendant had argued that the definition of

obscene material was facially overbroad "because acts of 'simple nudity' as opposed to hard core pornography can also be considered to be obscene". Id. 358. The definition of obscenity under Ohio law, when read in the statutory disjunctive, could have applied to mere nudity. The authoritative construction by the Ohio Supreme Court, consistent with *Miller* v. *California* 413 U.S. 15 (1973), in the *Burgun* case rendered that statutory definition constitutional because mere nudity was not proscribed.

The same argument was made in a federal habeas corpus attack on that statutory definition of obscenity in *Turoso* v. *Cleveland Municipal Court* 674 F. 2d 486 (6th Cir. 1982) cert denied 459 U.S. 880. There the petitioner argued that the statute would permit prosecution for "simple nudity". The court noted "This fear is exaggerated. The Ohio courts have recognized that nudity per se is not obscene. See eg. *Cincinnati* v. *Walton* 76 Ohio Law Abs. 162, 145 N.E. 2d 407 (1957), *State* v. *Lerner* 51 Ohio Law Abs. 321, 81 N.E. 282 (1948)". Id. 491 n.6. See also *State* v. *Rothschild* 109 Ohio Appeal 101, 163 N.E. 2d 907 (1959). A former version of Ohio obscenity laws had been upheld through authoritative construction when it proscribed mere nudity. *State ex rel Keating* v. *Vixen* 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973) State ex rel Ewing v. *"Without a Stitch"* 37 Ohio St. 2d 95, 307 N.E. 2d 911 (1974).

Thus, given the clear import of the Ohio statutory scheme regarding the regulation of child pornography, the statutory exemptions for parents when innocent conduct is involved or other bona fide statutory purposes, and with a history of the Ohio Supreme Court narrowing the application of the term nudity to remain within constitutional bounds, Osborne had fair warning of the conduct proscribed and knowledge that a narrowing construction was foreseeable.

As demonstrated herein, this case is unlike *Shuttlesworth* v. *Birmingham* 394 U.S. 147 (1969), be-

cause the Ohio statute was not radically reconstructed or interpreted beyond its fair proscriptions. Rather than rewriting the statute as alleged by Osborne, the Ohio Supreme Court properly interpreted the statute as written by the Ohio General Assembly.

The Ohio Supreme Court has no more rewritten an overbroad statute than the federal courts that have been called upon to interpret 18 U.S.C.S. §2251 et seq. with respect to the terms lewd and lascivious, as explained in the previous section of this brief.

Statutes do "not require impossible standards of certainty", *United States* v. *Petrillo* 332 U.S. I (1947), and the defendant has "no right to a literal construction" of a statute, *United States* v. *Scales* 367 U.S. 203, 224 (1961), and for that reason the vagueness and overbreadth doctrines are of no avail to Osborne in seeking to set aside his conviction.

C. The authoritative construction of Section 2907.323, Ohio Revised Code, was foreseeable and the conviction properly affirmed.

In *Dombrowski* v. *Pfister* 380 U.S. 479, 491 n.7 (1965) this court said "our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, (citations omitted), provided such application affords fair warning to the defendant." That principle has been long subscribed to by this court. *Cox* v. *New Hampshire* 312 U.S. 569 (1941), *Winters* v. *New York* 333 U.S. 507 (1948), *Poulos* v. *New Hampshire* 345 U.S. 395 (1953), *Ginsberg* v. *New York* 390 U.S. 629 (1968). See also *Hamling* v. *United States* 418 U.S. 87 (1974), and *Ward* v. *Illinois* 431 U.S. 767 (1977). Section 2907.323, Ohio Revised Code, is neither substantially overbroad under this court's decisions nor vague, and "one with fair warning

cannot challenge as vague a statute's application to others". *Parker* v. *Levy* 417 U.S. 733, 756 (1974).

Neither a lack of fair notice, nor vesting law enforcement authorities with too much discretion without minimal guidelines, are vices of Section 2907.323, Ohio Revised Code. When the photographs in question in this case are viewed, there can be no doubt that Osborne knew that those photographs were the kind at which the Ohio statute was directed. The photographs do not depict "mere nudity" or involve innocent poses on the proverbial bear skinned rug in front of the fire place, or the toddler at the beach. These are the type of photographs that cause the great harm to our children recognized by this court in *Ferber* when they are produced, circulated, possessed, and used by pedophiles.

It was well established by this court, and Ohio courts, that simple or mere nudity, without more, cannot be constitutionally proscribed. Reading the Ohio statutes together it is clear that the intention was not to proscribe simple nudity. Past Ohio Supreme Court decisions had narrowed statutes which used the term nudity, even in the disjunctive, to its constitutional reach. That construction was foreseeable, and in fact the only construction, that could be put on the Ohio statute consistent with its history, terms, exemptions, and purpose. This court has long held that in such situations, the statute, as construed, may be applied to conduct that preceded the construction, provided that application afforded fair warning to the defendant. *Massachusetts* v. *Oakes* 491 U.S. __ 105 L.Ed. 2d 493 (1989).

The fact that there were omissions in the instructions to the jury on these issues does not change this result. For, as stated by this court in *Henderson* v. *Kibbe* 431 U.S. 145, 154 (1977) "it is the rare case in which the improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial

court". Osborne did not object in the trial court to the definition with respect to nudity, or relative to a requirement that the nudity must involve a lewd exhibition of the genitals. While those omissions were error, "an omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id. 155.

When the record is reviewed in this case, those errors that were not objected to by Osborne with respect to the court's instructions, were harmless beyond a reasonable doubt, *Harrington* v. *California* 395 U.S. 250 (1969), and are not a basis to reverse an otherwise validly obtained state conviction because "the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity", and, "[n]o reasonable juror could believe that the photographs involved herein were anything but a lewd display". (J.A. 54).

CONCLUSION

Section 2907.323, Ohio Revised Code, is constitutional on its face and as applied to appellant Osborne for three reasons.

First, Section 2907.323, Ohio Revised Code, as construed by the Ohio Supreme Court, defines the type of material which involves a lewd exhibition or graphic focus on the genitals of children which this court found was not protected speech in *New York* v. *Ferber* 458 U.S. 742 (1982).

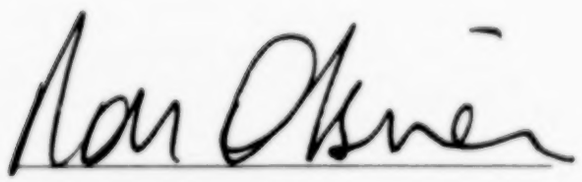
Second, Section 2907.323, Ohio Revised Code, prohibits the private possession of that type of child pornography to serve the compelling state interests of protecting and preventing the substantial harm to children caused by the production, circulation, possession, and use of child pornography. That possessory offense does not offend the principles of *Stanley* v. *Georgia* 395 U.S. 557, 568 n.ll (1969) because "compelling reasons... exist for overriding the right of the individual to possess those materials."

Finally, Section 2907.323, Ohio Revised Code, is not facially overbroad or vague, the narrowing construction of the term nudity was foreseeable, and in such a situation the statute, as construed, may be applied to Osborne's conduct which preceded the narrowing construction because he had fair warning of the conduct proscribed.

For each of the above reasons, the State of Ohio respectfully submits that this court should affirm the judgment of the Ohio Supreme Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this court, I, Ronald J. O'Brien, a member of the bar of this court, hereby certify that on the day 15th of September, 1989 three copies of the foregoing brief of the Appellee, State of Ohio, were personally delivered to the office of counsel of record for Appellant, S. Adele Shank, Assistant Ohio Public Defender, 8 East Long Street, 11 th Floor, Columbus, Ohio, 43266-0587, either to such counsel or an employee therein. I certify that all parties required to be served have been served.



Ronald J. O'Brien
City Attorney
City of Columbus, Ohio
City Hall
90 West Broad Street
Columbus, Ohio 43215-4184
(614)645-6902

Counsel of Record for Appellee

APPENDIX

[5]Ohio Senate Bill 243, effective 11-17-77, was enacted and reads as follows:

§2907.321 Pandering obscenity involving a minor.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

(2) Promote or advertise for sale or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers;

(3) Create, direct, or produce an obscene performance that has a minor as one of its participants;

(4) Advertise or promote for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;

(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants;

(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers.

(B)(1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under this section.

(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

(C) Whoever violates this section is guilty of pandering obscenity involving a minor. Violation of division(A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or

section 2907.322 [2907.32.2] or 2907.323 [2907.32.3] of the Revised Code, pandering obscenity involving a minor in violation of division (A)(5) of this section is a felony of the third degree.

[10]§2907.322 [Pandering sexually oriented matter involving a minor.]

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in material or performance.

(C) Whoever violates this section is guilty of pandering sexually oriented matter involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony

of the second degree. Violation of division (A)(5) of this section is a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(5) of this section, pandering sexually oriented matter involving a minor is a felony of the fourth degree.

§2907.323 [Illegal use of minor in nudity-oriented material or performance.]

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing a bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or perfor-

mance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(3) of this section, illegal use of a minor in a nudity-oriented material or performance is a felony of the fourth degree.

Supreme Court, U.S.
FILED
OCT 16
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal From The Supreme Court Of Ohio

REPLY BRIEF FOR APPELLANT

RANDALL M. DANA
Ohio Public Defender
S. ADELE SHANK
Assistant Ohio Public Defender
Counsel of Record
Ohio Public Defender Commission
8 East Long Street-11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394
JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821
Counsel for Appellant

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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STATEMENT OF THE CASE

In its Statement of the Case, Appellee, the State of Ohio, claims that the two Florida men mentioned as information sources in the search warrant were "subsequently convicted on federal charges arising from the use of the United States mail to distribute child pornography." (Appellee at 1) This alleged information is not in the record and is not relevant to the issues before this Court. The State claims that State's Exhibit 1-D is a photograph of a person different from the person depicted in State's Exhibits 1-A, 1-B, and 1-C. (Appellee at 4) The record indicates, however, that the same person was depicted in all four pictures. (J.A. 11, 16, 22) The State gives its judgment, not based on the record, that the jury "did not take long to find Osborne guilty." (Appellee at 5)

ARGUMENT

I. A FACIALLY INVALID STATUTE THAT PROSCRIBES FIRST AMENDMENT ACTIVITY IS UNENFORCEABLE AND CANNOT BE CONSTRUED AND THEN APPLIED TO CONDUCT WHICH OCCURRED PRIOR TO THE CONSTRUCTION.

Mr. Osborne argued in his Brief that an unconstitutionally overbroad statute may not be used to convict through a later constitutionalizing construction, because such a statute is a nullity. He argued that such a conviction is improper because the accused was not forewarned that his conduct would be illegal, and that the construction given in this case by the Ohio Supreme Court was unforeseeable. Finally, he argued that, where the construction is made only on appeal, his conviction is based on elements upon which he had no trial.

A. Ohio Revised Code Section 2907.323(A)(3) Was Unconstitutional On Its Face Due To Its Infringement Of First Amendment Rights. Such A Statute Is Invalid And Has No Legal Effect, And A Conviction Obtained Under It Is Invalid.

The State fails to respond to Mr. Osborne's position that an overbroad statute is a nullity and may not support a conviction

as a result of a constitutionalizing construction. Instead the State, in Section III of its Brief, claims that O.R.C. 2907.323(A)(3) was not overbroad as written. (Appellee at 36) However, the State does not dispute Mr. Osborne's position that O.R.C. 2907.323(A)(3) as written prohibited possession of depictions of mere nudity and lacked an element of scienter. (Appellant at 14) Nor does the State explain why the Ohio Supreme Court found it necessary to re-define "nudity" and add scienter, if O.R.C. 2907.323(A)(3) was constitutional on its face. The language of O.R.C. 2907.323(A)(3) itself, as well as the Ohio Supreme Court's attempt to give it a constitutionalizing construction, demonstrate that O.R.C. 2907.323(A)(3) was facially invalid.

Mr. Osborne's "acts were lawful because the statute that sought to prohibit them was overbroad and therefore invalid." *Massachusetts* v. *Oakes*, 491 U.S. ____, 109 S.Ct. 2633 (1989) (Scalia and Blackmun, JJ., concurring in part and dissenting in part; joined by Brennan, Marshall and Stevens, JJ., dissenting). Ohio Revised Code 2907.323(A)(3) was unconstitutional as written, and a subsequent construction may not be used to affirm Mr. Osborne's conviction.

B. Ohio Revised Code 2907.323(A)(3) Gave No Fair Warning That It Prohibited The Conduct Later Identified By The Ohio Supreme Court As Illegal When It Re-Wrote The Statute In Mr. Osborne's Case.

The State argues in Section III(B) of its Brief that O.R.C. 2907.323(A)(3) as written gave fair warning of the conduct prohibited, if it was read together with O.R.C. 2901.21(B), O.R.C. 2907.321, O.R.C. 2907.322, and a series of cases addressing adult obscenity. (Appellee at 39, 41) The great volume of material cited by the State as necessary to understand O.R.C. 2907.323(A)(3) belies the claim that fair warning was given by the statutory language.

The State urges that O.R.C. 2907.323(A)(3) as written was not "impermissibly vague in all of its applications," citing

Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). (Appellee at 40) However, *Hoffman* applies only where "the enactment implicates no constitutionally protected conduct." *Hoffman*, 455 U.S. at 494-495. In the case at bar, the enactment implicates constitutionally protected rights, namely speech and privacy. It was necessary to construe O.R.C. 2907.323(A)(3) or to hold it unconstitutional.

Finally, the State argues that Mr. Osborne should have foreseen that a "narrowing construction" would be made because a line of cases held that simple nudity is not obscene. (Appellee at 40-41) This argument ignores the fact that O.R.C. 2907.323(A)(3) is directed specifically at nudity, not obscenity, and that nudity is clearly defined by O.R.C. 2907.01(H). Ohio Revised Code 2907.323(A)(3) was vague both on its face and in its application to Mr. Osborne.

C. The Ohio Supreme Court Added New Elements To Ohio Revised Code 2907.323(A)(3) And Affirmed Mr. Osborne's Conviction On The Basis Of Them, Even Though Mr. Osborne Never Had A Hearing On, Or An Opportunity To Defend Against, Those Elements.

The trial court below did not require proof of the elements that the Ohio Supreme Court later added to O.R.C. 2907.323(A)(3)—a scienter element and a new definition of nudity that requires a lewd exhibition, or involves a graphic focus on the genitals, and an appeal to prurient interest. (J.A. 44-46) The jury below was not instructed on these elements. Mr. Osborne therefore did not have a trial on offense elements that ultimately were key to sustaining his conviction.

The State does not dispute that a conviction upheld on appeal on the basis of offense elements not in issue at trial violates due process. The State argues rather that the failure to have a trial on the newly added elements was harmless error because Mr. Osborne did not object to the jury instruction on nudity. (Appellee at 43-44) Mr. Osborne challenged the constitutionality of O.R.C. 2907.323(A)(3). (R. 3) His challenge was

overruled. (R. 7) The trial court instructed the jury using the statutory definition of nudity found in O.R.C. 2907.01(H). (R. 120) Ohio Revised Code 2907.323(A)(3) having been ruled constitutional as it stood, there was no basis for an objection to instructions consistent with the language of the statute. The State seems to argue that Mr. Osborne should have predicted the Ohio Supreme Court's later construction of O.R.C. 2907.323(A)(3) and requested an instruction consistent with that construction. Such clairvoyance cannot be required.

The State cites *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), to support its proposition that Mr. Osborne should have asked for a jury instruction on nudity. In *Henderson* the trial court failed to instruct the jury on causation in an armed robbery-murder prosecution. Every lawyer knows that causation is an element of murder. In the case at bar, however, no known element of O.R.C. 2907.323(A)(3) was omitted in the instructions. A lawyer might be held to know that O.R.C. 2907.323(A)(3) as written was unconstitutional, but even so, this would only lead a lawyer to demand, as trial counsel did below, that the court find the statute unconstitutional.

Here, moreover, the question is whether Mr. Osborne stands convicted under a statute different from that which was considered at trial. This Court's decision should not turn on whether the accused objected at trial to the failure to instruct on elements he did not know would exist.

The State does not address the trial court's failure to instruct on scienter. Mr. Osborne requested an instruction which included the "proper purposes" exceptions of O.R.C. 2907.323(A)(3). (R. 103-107) Those "proper purposes" are cited by the Ohio Supreme Court as demonstrating the scienter required for conviction. (J.A. 42) Even under the State's analysis, the failure to instruct on "proper purposes" was prejudicial error.

The State's claim that a constitutionalizing construction of O.R.C. 2907.323(A)(3) was foreseeable ignores the facts of the case. The constitutionality of the statute was challenged at

trial. Neither the trial judge nor counsel for the State was able to foresee the Ohio Supreme Court's construction. Mr. Osborne was charged and found guilty by his jury of an offense with elements different from those in O.R.C. 2907.323(A)(3) as later construed. Mr. Osborne was denied a trial on those elements.

D. The Ohio Supreme Court Substantially Re-Wrote O.R.C. 2907.323(A)(3) In Its Unsuccessful Effort To Bring It Within Constitutional Bounds.

The State argues in Section III(A) of its Brief that the addition of a scienter element, the manner in which "minor" was defined, and re-defining of the term "nudity" did not significantly alter the meaning of O.R.C. 2907.323(A)(3). In trying to render O.R.C. 2907.323(A)(3) constitutional, the Ohio Supreme Court fundamentally changed its import. Each alteration in the statute changed the character of the conduct prohibited and the character of proof required for conviction.

1. The Addition Of Three New Elements To The Definition Of "Nudity" Was A Substantial Change.

The State argues that the Ohio Supreme Court has construed the term "nudity" in Ohio obscenity statutes to require more than mere nudity, and therefore that the use of "nudity" in O.R.C. 2907.323(A)(3) gave notice that a "narrowing construction" would be rendered in the case at bar. (Appellee at 41) However, in none of the cases cited by the State did the statute use "nudity" alone to define obscenity." In *State* v. *Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978), and *Turoso* v. *Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982), *cert. denied* 459 U.S. 880, the statute involved was the current Ohio statutory definition of obscenity, which says that material is obscene if "[i]t contains a series of displays or descriptions of . . . nudity . . . the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

O.R.C. 2907.01(F)(5). It says as well that material is obscene if "[i]ts dominant tendency is to arouse lust by displaying or depicting . . . nudity in a way that tends to represent human beings as mere objects of sexual appetite." O.R.C. 2907.01(F)(2).

Obviously, the Ohio Supreme Court did not read these statutory definitions to mean mere nudity. Thus, the State's use of *State* v. *Burgun* and *Turoso* v. *Cleveland Municipal Court* is misleading. (Appellee at 40-41) The same is true of its use of *State ex rel. Keating* v. *Vixen*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973), and of *State ex rel. Ewing* v. *"Without a Stitch"*, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), which were decided under an earlier Ohio obscenity statute, O.R.C. 2905.34, which used essentially the same definition of nudity as found in O.R.C. 2907.01(F).

The State's use of *Cincinnati* v. *Walton*, 76 Ohio Law Abs. 162, 145 N.E. 2d 407 (1957), of *State* v. *Lerner*, 51 Ohio Law Abs. 321, 81 N.E.2d 282 (1948), and of *State* v. *Rothschild*, 109 Ohio. App. 101, 163 N.E. 2d 907 (1959), is even more misleading, because these three cases involved statutes that prohibited obscenity without any mention of the term "nudity." Thus, in these three cases the issue of the meaning of "nudity" in a statute did not arise.

The State compounds its misleading use of the Ohio obscenity cases by stating that "[p]ast Ohio Supreme Court decisions had narrowed statutes which used the term nudity . . . to its constitutional reach." (Appellee at 43) The State uses this statement to conclude that the Ohio Supreme Court's construction of "nudity" in the case at bar was foreseeable. In fact, however, no prior Ohio Supreme Court case construed mere "nudity" to include lewdness or anything of the like.

Ohio Revised Code 2907.323(A)(3) does not give notice that anything more than nudity is required for conviction. Indeed, at trial below, both counsel for the State and the trial judge put the case to the jury on the basis that O.R.C. 2907.323(A)(3) prohibited mere nudity. (R. *passim*) Neither counsel for the

State nor the trial judge suggested that depictions of nudity were prohibited only if they were lewd, or only if they involved a graphic focus on the genitals, or only if the possession was for prurient interest.

The Ohio Supreme Court said that "possession" in O.R.C. 2907.323(A)(3) means possession "for prurient purposes" only. (J.A. 42) Mr. Osborne has argued that this constitutes a new element in O.R.C. 2907.323(A)(3). (Appellant at 24) The State argues that "prurient interest" is not a new element, but its sole basis for so saying is that "prurient interest" is mentioned only in the Ohio Supreme Court's opinion, but not in the case syllabus. (Appellee at 39) The State says that this means that the reference to "prurient interest" is *dictum* only. (Appellee at 39)

However, the addition of "prurient purposes" was central to the court's effort to make O.R.C. 2907.323(A)(3) constitutional. The court said that before a person can be convicted under O.R.C. 2907.323(A)(3), his possession must be for "prurient purposes." (J.A. 42) "So construed," the court said, "the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (J.A. 42) Thus, the court used its addition of "prurient purposes" in an effort to render O.R.C. 2907.323(A)(3) constitutional under *Ferber*. "Prurient purposes," was not mere *dictum*.

The State argues that, under Ohio case law, if a proposition does not appear in the court's syllabus, it is *dictum*. (Appellee at 39) But the case it cites for this proposition, *Cassidy* v. *Glossip*, 12 Ohio St.2d 17 (1967), said only that the syllabus of a decision states the law of the case. *Cassidy* at 24. *Cassidy* did not suggest, however, that nothing appearing in the court's opinion can form part of its holding. Moreover, a 1985 Ohio statute indicates that an opinion of the Ohio Supreme Court states the case holding, by directing the judge writing an opinion to produce "a clear presentation of the law of the case." O.R.C. 2503.20.

2. The Addition Of Scienter Was A Substantial Change.

The Ohio Supreme Court added a scienter element to O.R.C. 2907.323(A)(3) where none existed. The State points out that the Ohio Supreme Court applied O.R.C. 2901.21(B), which says that if a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." This rule codifies Ohio case law. Committee Comment, O.R.C. 2901.21 as enacted in H.B. 511 (1973).

The State claims that the existence of this rule gave notice that recklessness would be added to O.R.C. 2907.323(A)(3) as the required culpable mental state. However, statutes prohibiting possession of communicative materials, which use the word "shall" without any mention of a required scienter, have been construed by the Ohio Supreme Court to impose strict liability. In *Cincinnati* v. *Marshall*, 172 Ohio St. 280 (1961), the court said that an ordinance prohibiting the possession of obscene literature or pictures, and reading "whoever shall . . . have in his possession . . . .," imposed strict liability. *Marshall*, 172 Ohio St. at 284. In *State* v. *Warth*, 173 Ohio St. 15 (1962), the court said that a statute that punished possession of obscene films and read "no person shall . . . have in his possession . . . .," imposed strict liability. *Warth*, 173 Ohio St. at 15-16. The court found both enactments unconstitutional.

Since the enactment of O.R.C. 2901.21(B), the Ohio Supreme Court has addressed several statutes in which scienter was not specified, but none involving First Amendment issues. The State cited two such cases. (Appellee at 37) The first involved child endangering, *State* v. *Adams*, 62 Ohio St. 2d 151, 404 N.E. 2d 144 (1980), and the second, engaging in prostitution, *State* v. *Parrish*, 12 Ohio St. 3d 123, 465 N.E.2d 873 (1984). In both cases the court read in an element of recklessness after finding that the legislature did not intend to impose strict liability. However, in *State* v. *Wac*, 68 Ohio St. 2d 84, 428 N.E. 2d 428 (1981), the court concluded that the legislature, by its silence on scienter, intended to impose strict liability in two

statutes which prohibit engaging in bookmaking, and using premises for gambling. The two statutes each prohibited two separate acts, and in both cases the legislature had specified a scienter element for one but not for the other. *Wac*, 428 N.E. 2d at 431.

A recent Ohio appellate decision says that, "When a statute reads 'No person shall . . . .,' absent any reference to requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability." *State* v. *Cheraso*, 43 Ohio App. 3d 221, 540 N.E. 2d 326 (1988). The Ohio courts thus do not automatically add "recklessness" when a statute is silent on scienter. The State's contention that it was clear that recklessness was the required mental state under O.R.C. 2907.323(A)(3) and that therefore the addition of this element is not a significant change is without merit. (Appellee at 37)

Prior to Mr. Osborne's case, the Ohio Supreme Court had not considered whether the legislature intended to include a scienter element in O.R.C. 2907.323(A)(3). The Ohio legislature wrote O.R.C. 2907.323 as a supplement to O.R.C. 2907.321 and O.R.C. 2907.322. In O.R.C. 2907.321 and O.R.C. 2907.322, it included the qualifying language "with knowledge of the character of the material." But it omitted such language from O.R.C. 2907.323. This omission suggests that, in O.R.C. 2907.323, the legislature intended to impose strict liability. Moreover, the formulation "with knowledge of the character of the material" was included in the bill that produced O.R.C. 2907.323 but was deleted by the legislature. H.B. 44 (1984).

At trial below, counsel for the State himself prosecuted Mr. Osborne. He did not suggest to the trial court that scienter was an element. (R. *passim*) A scienter element evidently was not foreseeable to counsel for the State at the time of trial. Nor was it foreseeable to the trial judge, who instructed the jury below without reference to a culpable mental state. (R. 120) It strains credulity for counsel for the State to assert that the addition of scienter was foreseeable when neither he nor the trial judge foresaw such an element.

3. The Construction Of "Minor" As A Person Under Eighteen Was A Substantial Change Since "Minor" Is Defined Elsewhere In O.R.C. 2907 As A Person Under Fifteen.

The State next argues that it was obvious that the trial court and the Ohio Supreme Court would find that the term "minor" meant a person under eighteen. (Appellee at 38) "Minor" is undefined in O.R.C. 2907.323(A)(3), and no other Ohio statute gives a definition applicable to O.R.C. 2907.323(A)(3). The State says that the common meaning of "minor" is one under eighteen, citing a law dictionary, a general dictionary, and an Ohio statute relating to gifts. (Appellee at 38) But the State omits mention of the fact that in the same chapter in which O.R.C. 2907.323(A)(3) appears, another provision, O.R.C. 2907.04, uses "minor" to mean one under fifteen. A definition given in the same chapter is more relevant than definitions in a law dictionary, a general dictionary, or a statute on gifts. Since courts read related statutes *in pari materia*, it was more foreseeable that the Ohio Supreme Court would construe "minor" to mean one under fifteen than one under eighteen.

In many states, as in Ohio, the legislature uses a different age of minority for different purposes. *Words and Phrases*, vol. 27, 1989 Cumulative Annual Pocket Part, at 90-91. Even though eighteen is used for certain purposes, that does not give fair warning that it will be so used in a particular context. Moreover, in some situations factors other than age are relevant in determining the meaning of "minor." A person otherwise a minor by virtue of age may not be so if married or emancipated.

The State points out that Mr. Osborne testified at trial that he believed the individual depicted in the photographs was fourteen years old. (Appellee at 39 n. 17) But Mr. Osborne's hearsay belief as to the age of the individual depicted is irrelevant on the issue of whether it was foreseeable what age O.R.C. 2907.323(A)(3) required.

The State attempts to distinguish *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), by saying that the Ohio

Supreme Court did not radically reconstruct O.R.C. 2907.323(A)(3). (Appellee at 41-42) But in this case as in *Shuttlesworth* the state supreme court added elements to try to render an overbroad statute constitutional and substantially changed the character of the statute. Ohio Revised Code 2907.323(A)(3) was enacted to regulate child "nudity-oriented" material. The Ohio Supreme Court has attempted to turn it into a child pornography statute.

II. THE STATE MAY NOT PROHIBIT PRIVATE POSSESSION IN THE HOME OF MATERIALS THAT DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSISTS OF A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Throughout its Brief the State assumes that the materials regulated by O.R.C. 2907.323(A)(3) will be classified as child pornography. As Mr. Osborne has shown in his Brief, however, the materials regulated by O.R.C. 2907.323(A)(3) fall outside the definition of child pornography as set out in *New York* v. *Ferber*, 458 U.S. 747 (1982). (Appellant at 32-42) Even if these materials were child pornography, Mr. Osborne has the right to possess them in the privacy of his home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

A. To Protect Mr. Osborne's Possession In The Case At Bar, This Court Does Not Need To Create A New Constitutional Right.

The State argues in Section I(B) of its Brief that, before it can overturn Mr. Osborne's conviction, this Court must find a new constitutional right "to possess child pornography in the privacy of the home." (Appellee at 16) To the contrary, the fundamental right to view whatever one likes in the privacy of one's home has long been part of this country's heritage. U.S. Const. amend. I; *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

The State claims that possession of child pornography is the equivalent of committing an illegal sexual act in one's home. (Appellee at 16-17) The State misrepresents the character of

the conduct regulated by O.R.C. 2907.323(A)(3). Possession of a photograph is like the possession of a book. Each is nothing more than a communication held in abeyance until the possessor casts an eye upon the page. The ideas conveyed may be good or bad, noble or base, but receipt of them is not a criminal act. The State has no right to control the content of men's minds or of their libraries. *Stanley*, 394 U.S. at 566. Recognizing the right to possess communicative materials creates no new constitutional right.

The State argues that the holding in *Stanley* limits constitutional protection for the private possession of unprotected communicative materials to obscenity. It cites in support of this position a footnote in *Stanley* in which this Court said that it did not "mean to express an opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials." (Appellee at 18) This Court there cited 18 U.S.C. 793(d), which criminalizes the possession of classified national security materials, which might be used to the injury of the United States. *Stanley*, 394 U.S. at 568 n. 11.

The State suggests that this footnote means that the constitutional rights recognized in *Stanley* do not protect the private, in-home possession of child pornography. However, in citing 18 U.S.C. 793(d), this Court was not excluding from constitutional protection non-obscene printed material or film that a person might possess for personal use. Mr. Osborne is not asking this Court to create a new constitutional right, but to recognize his long-established right to privacy and to receive communicative materials.

B. The State Has No Compelling Interest In Prohibiting The Private, In-Home Possession Of Communicative Materials.

In Section I(c) of its Brief, the State claims a compelling interest in prohibiting the private, in-home possession of child pornography. However, it does not demonstrate that interest.

1. A Prohibition On Possession Of The Materials Regulated By O.R.C. 2907.323(A)(3) Is Not Narrowly Tailored To Prevent The Circulation And Distribution Of Child Pornography.

The State claims that prohibiting possession will prevent further circulation and distribution of depictions of child nudity. A statute prohibiting circulation and distribution would be more narrowly tailored to serve this end and would be less invasive of the right to private, in-home possession of communicative materials.

2. Prohibiting Possession Of The Materials Regulated By O.R.C. 2907.323(A)(3) Will Not "Dry Up" The Market For Child Pornography.

The State argues that prohibiting in-home possession for personal use is an appropriate means to serve its interest in combating child pornography, because such a prohibition will "dry up" the chain of distribution. (Appellee at 19-21) But the State does not explain how such a prohibition will achieve that goal. The State claims that a penalty for private possession is now necessary because "much of the child pornography market has been driven underground, and . . . is non commercial." (Appellee at 20) The State claims that it is easier to locate and prosecute private possessors than to locate and prosecute private producers and distributors. (Appellee at 20, citing *Ferber*, 458 U.S. at 759-760) This questionable assertion was rejected in *Stanley* and should be rejected again. *Stanley*, 394 U.S. at 567-568.

The State argues that "[c]hild pornography is . . . often homemade as in Osborne's case." (Appellee at 20-21) This factual assertion goes beyond the record. In *Ferber*, this Court cited the harms specific to commercial production and distribution as significant considerations in its determination that child pornography is unprotected speech. Private production does not carry the same degree of risk of harm. Multiple copies, mass distribution, and glossy, high-tech production are absent in a non-commercial setting. But even if private production

were the main source of child pornography, a prohibition on possession is not the most narrowly tailored means to stop production. A statute prohibiting production would better serve this goal.

In *Ferber*, this Court authorized the criminalization of the commercial production and commercial distribution of child pornography to "prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 753. Commercial production and commercial distribution are the essence of the child pornography industry. Criminalizing the private, in-home possession of child pornography will not stop production and distribution.

3. The Material Regulated By O.R.C. 2907.323(A)(3) Cannot Be Prohibited On The Theory That It May Be Used To Commit A Subsequent Crime.

The State asserts that child pornography may be used as a "criminal tool" by pedophiles to convince children to engage in sexual activity. (Appellee at 21-23) This assertion goes beyond the record in this case. Even if it is true that some child molesters use child pornography to seduce, it is the conduct of child molesting that should be punished and not the possession of child pornography. Prohibiting the possession of child pornography would penalize many who never consider molesting a child. The State's implication that the possession of child pornography leads to the actual abuse of children is highly speculative. The anecdotal account cited by the State (Appellee at 22-23) does not establish a causal link between possessing child pornography and molesting children. The state may prohibit harmful activity but may not prohibit the possession of every instrumentality that might be used for an illegal purpose, particularly where the instrumentality is communicative material. The State's claim that some child molesters possess child pornography is not a sufficient basis for prohibiting the private, in-home possession of these materials.

III. THE STATE MAY NOT, CONSISTENT WITH FIRST AMENDMENT RIGHTS OF SPEECH, PROHIBIT THE POSSESSION OR VIEWING OF MATERIALS WHICH DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSTITUTES A "LEWD EXHIBITION" OR INVOLVES "A GRAPHIC FOCUS ON THE GENITALS."

A. Depictions Of Child Nudity, Where The Nudity Constitutes A "Lewd Exhibition," Or "Involves A Graphic Focus On The Genitals," Are Protected Speech.

The State argues in Section II of its Brief that the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3) does not go beyond the *Ferber* definition of child pornography. Throughout its argument, the State pretends that the phrase "lewd exhibition" as used by the Ohio Supreme Court has the same meaning as "lewd exhibition of the genitals" as used in *Ferber*. This is not true. The Franklin County Court of Appeals adopted the phrase "lewd exhibition of the genitals" (J.A. 29), but the Ohio Supreme Court dropped the requirement that genitalia be depicted when it determined that only a lewd exhibition is required. This Court said in *New York* v. *Ferber*, 458 U.S. 747 (1982), that "lewd exhibitions of the genitals" fell within the definition of child pornography assuming that the New York courts did not "widen the possibly invalid reach of the statute by giving an expansive construction" to that phrase. *Ferber*, 458 U.S. at 773. Child pornography as defined in *Ferber* requires a depiction of sexual conduct. *Ferber*, 458 U.S. at 765. A "lewd exhibition" could include simple nudity. It clearly does not include sexual conduct, since depictions of sexual conduct are regulated by other statutes. O.R.C. 2907.321; O.R.C. 2907.322. As construed by the Ohio Supreme Court, O.R.C. 2907.323(A)(3) prohibits the possession of constitutionally protected materials.

The State claims that O.R.C. 2907.323(A)(3) is not overbroad but fails to address the many aspects of overbreadth cited by

Mr. Osborne. In particular, the State does not address the following.

1. The Inclusion Of "Viewing" Is Overbroad.

The State fails to respond to Mr. Osborne's assertion that the prohibition against viewing renders O.R.C. 2907.323(A)(3) substantially overbroad. This prohibition means that even one who does not possess the prohibited material could be convicted if it comes within his line of vision, as where a person passes by a drive-in movie theater. The inclusion of "viewing" means that O.R.C. 2907.323(A)(3) reaches considerable conduct that is beyond what the state may prohibit consistent with the First Amendment.

2. The Inclusion Of "Possession" Is Overbroad.

For the reasons stated above, the inclusion of a prohibition on possession serves no compelling interest of Ohio and is therefore an overbroad regulation. U.S. Const. amend. I; *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

3. The Inclusion Of Non-Commercial Production And Distribution Is Overbroad.

The State argues that it is constitutionally permissible to criminalize possession of depictions of nude minors, absent any commercial production or commercial distribution. (Appellee at 33-34) It argues that, under *Ferber*, a state may criminalize mere possession: "While it is true that *Ferber* was directed at commercial distribution of child pornography, the court's opinion in *Ferber* clearly indicates that a commercial purpose is not required, . . ." (Appellee at 34) The State does not explain how it derives from *Ferber* its conclusion that a commercial purpose is not required. The sole issue before this Court in *Ferber* was whether "to prevent the abuse of children who are made to engage in sexual conduct for commercial purposes" New York might "prohibit the dissemination of material which shows children engaged in sexual conduct." *Ferber*, 458 U.S. at 753. In *Ferber* this Court found the harm to the child to lie in commercial production and commercial distribution. It was the child pornography industry that this Court found to be harmful to children. This Court did not have before it a situation involving photographs of children taken, as in the case at bar, in a non-commercial context, or involving the possession of photographs of children by a person not engaged in their production or sale.

4. The Failure To Require A "Posing" Is Overbroad.

One aspect of the overbreadth of O.R.C. 2907.323(A)(3) is that it does not require that a photograph be posed. (Appellant at 40) The State suggests, however, that O.R.C. 2907.323(A)(3) as construed by the Ohio Supreme Court requires that a child be "posed" in a photograph. (Appellee at 30) By stating that O.R.C. 2907.323(A)(3) requires a "posing," the State implies that some kind of manipulation of the photographic model is essential for conviction. In fact, neither O.R.C. 2907.323(A)(3) nor the Ohio Supreme Court's construction of it so requires. Ohio Revised Code 2907.323(A)(3) covers even a candid photograph of a child running naked on a beach or playing in a bathtub if the focus or camera angle is "graphic." This is a far cry from the staging of a sexual performance that was at issue in *Ferber*.

B. The Ohio Supreme Court's Construction Of Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Serve A Compelling State Interest.

The State argues that even if no sexual conduct occurs in a photograph depicting a nude child, such conduct may have taken place before or after the photograph was taken. (Appellee at 35 n.16) The State then claims that O.R.C. 2907.323(A)(3) is narrowly tailored to serve Ohio's interest in preventing child sexual abuse. A narrowly tailored statute would punish the child sex abuser and not the possessor of a photograph which does not depict any sexual conduct.

The State misreads the exception for parents in O.R.C. 2907.323(A)(3). (Appellee at 35) Ohio Revised Code

2907.323(A)(3) as written permitted parents to possess photographs of their nude children. But if, as the State asserts, the Ohio Supreme Court has turned O.R.C. 2907.323(A)(3) into a child pornography statute, then the exception permits parents to possess, or authorize others to possess, child pornography involving depictions of their own children. The fact that this result is so outrageous demonstrates that the Ohio Supreme Court turned O.R.C. 2907.323(A)(3) into something other than what the legislature intended.

Incredibly, however, the State asserts that the parental exception confirms "that protected or innocent conduct is outside the scope of the statute." (Appellee at 35) It says that the exception indicates that "Ohio has chosen to make clear that it has not proscribed possession for bona fide and proper purposes." (Appellee at 35) If O.R.C. 2907.323(A)(3) prohibits possession of child pornography in order to protect the children involved in its production, as the State asserts, this purpose is defeated by letting parents possess or authorize production or possession of pornographic depictions of their children.

The State similarly misreads the O.R.C. 2907.323(A)(3) exception for possession for an artistic purpose. (Appellee at 35) Here too, in O.R.C. 2907.323(A)(3) as written, an artistic purpose exception made sense. Its effect was to allow possession of artistic depictions of child nudity. But if O.R.C. 2907.323(A)(3) as construed by the Ohio Supreme Court regulates child pornography, then the artistic purpose exception makes no sense.

The State says that the exceptions in O.R.C. 2907.323(A)(3) limit O.R.C. 2907.323(A)(3) to regulating child pornography only. (Appellee at 35) But they do not. The State inadvertently concedes that O.R.C. 2907.323(A)(3) as construed regulates depictions of mere nudity when it says that the purpose of the parental exception is to exclude the liability of a parent for possessing a photograph "of his or her naked one year old running on a beach or romping in a wading pool." (Appellee at 35) This is what the Ohio legislature intended. As the State

acknowledges, if this exception were not in O.R.C. 2907.323(A)(3), a parent would be liable for possessing a photograph of his naked child, precisely because O.R.C. 2907.323(A)(3) prohibits depictions of mere nudity.

The fact that O.R.C. 2907.323(A)(3), even as construed by the Ohio Supreme Court, prohibits possession of depictions of mere nudity demonstrates that it remains overbroad and is not narrowly tailored to serve Ohio's interest in combating child pornography.

CONCLUSION

In its Brief, the State of Ohio says nothing that effectively rebuts the three propositions of law asserted by Appellant Clyde Osborne. Mr. Osborne stands convicted of an offense that did not exist when he was charged. He has the right under the Constitution to possess the materials in question. Mr. Osborne asks this Court to grant the relief he requested in his Brief.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender
S. ADELE SHANK
Assistant Ohio Public Defender
Counsel of Record
Ohio Public Defender Commission
8 East Long Street-11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394
JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 292-6821
Counsel for Appellant

(9)

JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBOURNE, *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA, FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, NATIONAL COALITION AGAINST PORNOGRAPHY, NATIONAL LEGAL FOUNDATION, ATHLETES FOR KIDS, NATIONAL CHRISTIAN ASSOCIATION AND THE BEREAN LEAGUE, IN SUPPORT OF THE APPELLEE.

MARK N. TROOBNICK*
JORDAN W. LORENCE
CIMRON CAMPBELL
Concerned Women for America
370 L'Enfant Promenade SW
Suite 800
Washington, D.C. 20024
(202) 488-7000
**Counsel of Record*

H. ROBERT SHOWERS*
Gammon & Grange
1925 K St. NW Suite 300
Washington, D.C. 20006
(202) 862-2000

WENDELL R. BIRD
1150 Monarch Plaza
3414 Peachtree Lane
Atlanta, Georgia 30326
(404) 264-9400

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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INTEREST OF THE AMICI CURIAE*

Concerned Women for America is a national non-profit organization representing over 600,000 people seeking to preserve traditional Judeo-Christian values and is committed to see the eradication of the exploitation and abuse of children by child pornography.

Focus on the Family is a Christian, non-profit organization, with a nationwide publication and broadcast audience of over two million, which is committed to protecting and strengthening families and children in the United States and throughout the world.

Family Research Council is the Washington, D.C. public policy and research voice for the pro-family movement which seeks to encourage government action and citizen awareness to promote family interests including the eradication of child pornography and child sexual abuse in our country.

National Coalition Against Pornography is a national non-profit organization which seeks to eliminate child pornography and illegal obscenity city by city across the entire United States through building broad coalitions and raising public awareness.

National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms through education and litigation. The Foundation is dedicated to advocacy in support of a proper rendering of the First Amendment's guarantees.

Athletes for Kids is a non-profit organization representing over 100 professional athletes and dozens of corporate leaders nationwide who have joined together with a common purpose of educating young people about the harms of pornography and illicit sex.

National Christian Association is a national non-profit organization, which started Pornography Awareness Week and the National Decency Forum, which seeks to eliminate

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* A complete description of Amici may be found in the appendix. This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

adult and child pornography and thereby reduce child molestation, illicit sex, rape and sexual murders in the United States.

The Berean League based in St. Paul, Minnesota, is a non-profit organization established to maintain a strong, well researched and effective voice to promote the use of Biblical principles in our government and community.

Have a special interest in and knowledge of protecting the physical, emotional, spiritual and psychological health and well being of America's children which will be helpful to the Court in this case.

SUMMARY OF ARGUMENT

The court below upheld the constitutionality of an Ohio statute which criminalized the mere private possession of sexually explicit photographs of children. While fully considering the First Amendment concerns expressed by this Court in decisions on the regulation of pornography, the Ohio Supreme Court highlighted the legal difference between child pornography and obscenity and focused on the varied harms to the children that only possession of child pornography laws can curtail. In addition, the Court determined that requiring proof that a defendant had actual knowledge of the depicted victim's true age is impracticable, and would render most child pornography statutes meaningless if such a scienter standard is required for enforcement.

The landmark case in this area, *Ferber* v. *New York*, 458 U.S. 747 (1982), recognized for the first time the extensive harm done to the child victim from the production and distribution of child pornography. In light of the special harm to children, the *Ferber* court declared that child pornography need not meet the stringent three part test for obscenity. Thus, criminal violations for child pornography now only require a visual depiction of a minor involved in sexually explicit conduct. According to Congress, state legislatures and the courts, laws against child pornography uniquely focus on and are designed to stop the *harm to the victim* rather than the concern about the negative effects on the audience, local community or society as in anti-obscenity legislation.

After child pornography became a separate offense from obscenity, ease of prosecutions and severity of sentences helped change the child pornography industry into an underground network controlled primarily by pedophiles: adults who have a sexual preference for children. In this evolution, production, distribution, consumption and use of child pornography to seduce child victims all became more interrelated with one another and inseparable from the molestation of children.

All facets of this circular chain of child pornography involve serious harms to children although each may cause a different, though related, injury. Consumption and use of child pornography, the final links in the chain, involve special harm to children because child pornography is an essential ingredient to child molestation and its possession and demand fuels the production and distribution market.

In the underground network today, the primary uses of child pornography are: (1) to stimulate pedophiles and child molesters; (2) to lower inhibitions of child victims; (3) to blackmail the child victims into silence; and (4) as a teaching tool for the sexual abuser. Profits from child pornography are often of secondary importance to the network. Moreover, the producer and distributor of child pornography are now often the user and molester in the clandestine, circular, pedophile network, or "cottage industry," where child pornography thrives. Possession laws are necessary to break this circle and stop the child exploitation which occurs at all points in the revolving network.

Scientific research and law enforcement studies further reveal an indisputable link between child pornography and child exploitation as well as the severe harm suffered by children from child pornography. Evidence overwhelmingly supports the conclusion that child pornography primarily exists for use and consumption by pedophiles and child molesters. Removal of all incentive for the production and distribution of child pornography, which is the ability to sell or distribute the pornography to the customer or possessor, is essential to dry up the circular chain of child pornography. Therefore, criminalizing possession of child pornography is paramount to curtail the harm to children, to break the cycle of child sexual victimization and to dry up the market for child pornography.

ARGUMENT

I. CHILD PORNOGRAPHY, WHICH IS CHILD SEXUAL EXPLOITATION IN PICTURES, HARMS CHILDREN BY ITS PRODUCTION, DISTRIBUTION AND CONSUMPTION BECAUSE IT IS A PERMANENT RECORDING OF THEIR SEXUAL ABUSE AND THE SEDUCTION TOOL OF CHOICE FOR THE CHILD MOLESTER

Against a backdrop of growing public indignation over the proliferation of child pornography and its related harms to children, the Court in *Ferber* v. *New York*, 458 U.S. 747 (1982), defined a new category of unprotected speech separate and apart from obscenity. *Ferber* dealt exclusively with child pornography, not obscenity involving only adults, and upheld the New York criminal statute which outlawed the promotion of sexual performances by minors through distribution of *visual depictions of children engaged in sexual activity* which was not legally obscene. *Ferber*, 458 U.S. at 756-765. The reason that this particular type of pornography is given special consideration by the Court is due to the inherent and continuing injury which is increasingly being inflicted upon children by this activity. *Id.* This Court in *Ferber* ruled that the state's "compelling" interest in protecting *child victims* from sexual exploitation through child pornography was of "surpassing importance" to bypass the three part adult obscenity test stated in *Miller* v. *California*, 413 U.S. 515 (1973). *Ferber* 458 U.S. at 757.[1] Hence, the focus of child pornography laws was placed on the child victims and not on the material's negative effects on the audience, community, or the harm to societal values and morals as are the traditional primary concerns of adult obscenity laws.[2]

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[1] The state's interest "in safeguarding the physical and psychological well-being of a minor is compelling" and the value of permitting possession of "photographic reproductions of actual children engaged in lewd, sexual conduct is exceedingly modest if not *de minimis*." *See Ferber*, 459 U.S. at 762.

[2] This Court has found that:

> The sum of experience affords an ample basis . . . to conclude that a sensitive, key relationship of human existence, centered to family life, community welfare, and the development of human personality, can be debased and distorted by crass, commercial exploitation of sex. . . . [The state's interests in obscenity laws] include the interest of the public in the quality of life, the total community environment, the tone of commerce and possibly the public safety itself.

Paris Adult Theatre v. *Slaton*, 413 U.S. 49, 63 (1973)

While the *Ferber* Court did not consider the final stage of the child pornography cycle, i.e., private possession and use, the Court set forth a number of important and legitimate state objectives accomplished by the eradication of child pornography which are instructive in this case.

First, "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic material is harmful to the psychological, emotional and mental health of the child." *State* v. *Meadows*, 28 Ohio St.3d 43, 49 (1986) citing *Ferber* 458 U.S. at 758.

Second, the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways: (1) the materials produced are a permanent record of the children's participation and (2) the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. *Meadows*, 28 Ohio St.3d, at 49 citing *Ferber*, 458 U.S. at 759.

Third, consumption and use of child pornography is a critical link in the chain of sexual exploitation of children because it is essential to the seduction and molestation process. As the Ohio Supreme Court recognized:

> The Court [in *Ferber]* also discerned that state efforts directed at the banning of production would not adequately solve the dilemma. The hidden reality of the child pornography industry makes it difficult, if not impossible to halt the exploitation of children by pursuing only those who produce . . . . In this regard, we note that the *possessor's desire to maintain depictions of child abuse* also *"provide[s] an economic motive for and [is] thus an integral part of the production of such materials*, an activity illegal throughout the Nation." *A flourishing home market for such abusive materials will help guarantee that there will be additional victimization of children.* (Citations Omitted.)

Meadows, 28 Ohio St.3d at 49.

Nineteen states have passed laws outlawing the private possession of child pornography.[3] The constitutionality of such

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[3] Arizona (1983), Minnesota (1983), Nevada (1983), Alabama (1984), Ohio

child pornography possession laws have been upheld by the three state Supreme Courts considering the issue. *State* v. *Meadows*, 503 N.E.2d 697, 28 Ohio St.3d 43 (1986), *cert denied*, 480 U.S. 936 (1987); *Felton* v. *State*, 526 So. 2d 635 (Ala. Crim App 1986), *aff'd*, 526 So.2d 638 (Ala. 1988); and *People* v. *Geever*, 522 N.E.2d 1200, 112 Ill.2d 313 (Ill.), *dismissed for want of jurisdiction*, 102 Led.2d 319 (1988). The rationale and impetus for passing such laws and for upholding the constitutionality of the laws appear to have at least three common threads: first, the overwhelming harm to children caused by consumption and use of child pornography in molestation; second, the realization that production, distribution, possession and use of child pornography are intimately connected and inseparable to the pedophile network; and third, the public's strong desire to dry up the child pornography market.[4]

A. Evidence Clearly Reveals That Child Pornography Is Directly Connected With Child Molestation.

The rapid growth of child pornography[5] reveals a demand for material by people who are stimulated by depictions of sexual activity with children. As one FBI behavioral scientist has said,

> Child pornography exists primarily for the consumption of pedophiles. If there were no pedophiles, there would be little child pornography other than that involving adolescent children.

(1984), Oklahoma (1984), Washington (1984), Florida (1985), Illinois (1985), Texas (1985), Utah (1985), Kansas (1986), Georgia (1987), Idaho (1987), Missouri (1987), South Dakota (1987), Colorado (1988), Nebraska (1988) and West Virginia (1988).

Citizens for Decency Through Law, Inc., *The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney* 170 n. 1 (2d ed. 1988).

[4] See also *United States* v. *Andersson*, 803 F.2d. 903, 907 n.3 (7th Cir. 1986) (court discusses that a State's interest in regulating child pornography "may well extend into the private home.")

[5] A U.S. Senate inquiry concluded that child pornography was a highly organized industry grossing several million dollars per year. S. Rep. 95-438, 2nd Sess. 42 (1978). In recent years more than one million children have been photographed in sexually explicit poses or while engaging in sexual acts with adults or with other children. D. Scott, *Pornography, It's Effect On The Family, Community and Culture* 17 (1985).

K. Lanning, *Child Molesters: A Behavioral Analysis* 18 (2d ed. 1987) [hereinafter *Child Molesters*]. Pedophilia—the predisposition to sexually abuse children, is a real and continuing threat to children.[6]

In a 1983 study by Dr. William Marshall at Kingston Penitentiary, he found 87% of the child molesters of the girls and 77% of the child molesters of boys admitted regular use of pornography. W. Marshall, *Report On The Use Of Pornography by Sexual Offenders; Report to the Federal Department of Justice*, Ottawa, Canada (1983). Pornography was reportedly used for three main purposes:

(1) to stimulate the viewer or child molester;

(2) to destroy the consciences and lower the inhibitions and resistance to sexual activity in their intended child victims; and

(3) as teaching tools for the child to imitate or model in their real life sexual encounter with an adult.

Id.; *See also* W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-offenders*, 25 J. of Sex Research 267-288 (1988).

A recent study of 1400 child sexual exploitation cases reported in Louisville between July 1980 and February 1984 shows that a significant number of molestation cases involve child pornography. *The Effects of Pornography on Children and Women*, Hearings before the Subcommittee of Juvenile Justice, Committee on the Judiciary U.S. Senate (testimony of John Rabun, for the National Center for Missing and Exploited Children, Sept. 12, 1984). Over 40 major cases, involving 12 or more child victims, were studied in depth in Louisville and that research revealed that all 40 involved various forms of adult pornography and in most cases, child nudes and/or child por-

[6] Child Molesters and pedophiles are not synonymous terms. All child molesters are not pedophiles and all pedophiles are not child molesters. A child molester may not have a sexual preference or fantasy for children but may sexually abuse children due to simple availability, to avoid sexually transmitted diseases from adults, curiosity, or a desire to hurt a loved one of the molested child. On the other hand, some pedophiles may not act out their fantasy or preference for having sex with children and thus, not become a child molester. *Child Molester* at 1-3.

nography were found at the molester's premises. *Id.* Clearly, child pornography is directly linked to child sexual abuse and pedophilia.

Child sexual abuse continued to rise with a three fold increase occurring between 1980 and 1986, with 138,000 reported and confirmed cases of child sexual abuse in 1986. *See* National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect* (1988) (NIS-2). However, estimates of actual child sexual abuse greatly exceed 138,000.[7] It is estimated that "one in three females and one in ten males will be sexually molested before the age of 18; and four million child molesters [are believed to] reside in this country." U.S. Department of Justice, Network News 7 (Fall 1985).

According to the Congressional Subcommittee on Child Pornography and Pedophilia "no single characteristic of pedophilia is more pervasive than the obsession with child pornography." U.S. Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, *Child Pornography and Pedophilia*, 99th Cong., 1st Sess. (1988) (Available at the U.S. Government Printing Office, Washington, D.C.) [hereinafter "Subcommittee on Child Pornography"]. Law enforcement studies have verified that pedophiles almost always collect child pornography and child erotica. *Child Molesters* at 17-25. "Detective William Dworin of the Los Angeles Police Department estimates that of the 700 child molesters in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About 80% owned [some type of] pornography." Subcommittee on Child Pornography at 40-60. Child pornography plays a central role in child molestation by pedophiles, serving to justify their conduct, assist them in seducing their victim and provide a

[7] National statistics showed an increase of 400 percent in child sex abuse reports from 1977-1982. In 1984 alone there were 123,000 reported cases, a 35% increase over 1983 and still, says one researcher, we're only touching the "tip of the iceberg." M. Mawyer, *Silent Shame* 27 (1987).

means to blackmail the children they have molested in order to prevent exposure. *Id.*

Even more alarming than the rising statistics of child sexual abuse and its connection to child pornography is what researchers are now referring to as the cycle of child victimization. National Center for Missing and Exploited Children, *Child Pornography and Prostitution* 2-3 (1987) [hereinafter *"Child Pornography"]; Subcommittee on Child Pornography* at 100-101. Most sexually exploited children are seduced into participating in sexual activity with adults. Some are missing children (runaways, throwaways, stranger abductions) who become exploited through prostitution and pornography, and some are relatives or children in the neighborhood of the molester. *Child Molesters* at v-vi. While no accurate studies or statistics are available, it is clear that a significant number of sexually abused children become molesters if not treated early and adequately. According to recent studies, homosexual and heterosexual child molesters average between 30 and 60 child victims respectively before being caught and child molesters will sexually abuse 380 children in their lifetime. G. Abel, *Sexual Aggressive Behavior* (1986). If even some of the 380 children became molesters who in turn sexually abuse 380 children, the exponential increase of sexual exploitation of the children in the second and third generations will be staggering. The Los Angeles Police Department reports that most child molesters (80%) were themselves molested as a child and that they generally seek out victims of the same age and sex of when they were first molested. *Subcommittee on Child Pornography* at 52-53. Scientific research has verified this law enforcement study by finding that 57% of the child molesters studied reported that they were themselves molested as children. Carter, *Use of Pornography In the Criminal and Developmental Histories of Sexual Offenders*, Report to the National Institute of Justice and National Institute of Mental health (1985) (hereinafter "Use of Pornography").

Some pedophiles have organized and become vocal about what they believe is their right to sexual fulfillment. Pedophile organizations such as Rene Gagon Society, whose motto is "Sex by eight or its too late," North American Man-Boy Love Asso-

ciation (NAMBLA) and the groups who met at the International Pedophilic Information Exchange in Wales in 1977, openly advocate laws to permit sex between adults and consenting children, and seek to abolish the minimum age requirement for consenual sexual acts.[8] Final Report of the Attorney General's Commission on Pornography 155 n.592 (M. McManus ed 1986) (hereinafter Commission on Pornography); Child Pornography at 2. With the apparent growth and organization of pedophiles is a concomitant demand for child pornography.

A direct causal link has also been shown through sociological studies to exist between repeated exposure to sexually explicit material involving children and child molestation. *Report of the Surgeon General's Workshop on Pornography and Public Health*, Office of the Surgeon General, U.S. Public Health Service, U.S. Department of Health and Human Services 13 (Aug. 1986) (hereinafter "Surgeon General's Report). In a 1985 study, child molesters were found to use pornography more often than normal adults, were significantly more likely to use these materials prior to and during their offenses, and to employ pornography to relieve an impulse to commit an offense.

A professor of psychology at the University of Utah noted another striking example of the link between child pornography acting as a catalyst for violence,

> Another example of the effects of pornography comes from Gary Bishop, convicted homosexual pedophile who murdered five young boys in Salt Lake City, Utah, in order to conceal his sexual abuse of them. He wrote in a letter after his conviction: "[P]ornography was a determining factor in my downfall. Somehow I became sexually

[8] G. Abel, J. Becker, J. Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 International J. of Law and Psychiatry 96-97 (1984). For child pornography, moreover, issues about a child's capacity to consent are compounded by the exploitative relationship out of which the pornography develops. Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. Crime and Just. 65 (1980). As this Court stated in *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979), "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

> attracted to young boys and I would fantasize them naked. Certain bookstores offered sex education, photographic or art books which occasionally contained pictures of nude boys. I purchased such books and used them to enhance my masturbatory fantasies. But it wasn't enough. I desired more sexually arousing pictures so I enticed boys into letting me take pictures of them naked. From adult magazines I also located addresses of foreign companies specializing in "kiddie porn" and spent hundreds of dollars on their magazines and films. . . .
>
> Such materials would temporarily satisfy my cravings but soon I would need pictures that were more explicit and revealing. Some of the material I received was shocking and disgusting at first, but it shortly became commonplace and acceptable. As I continued to digress further into my perverted behavior, more stimulation was necessary to maintain the same level of excitement. Finding and procuring sexually arousing materials became an obsession. For me, *seeing pornography was like lighting a fuse on a stick of dynamite. I became stimulated and had to gratify my urges or explode . . . all boys became mere sexual objects*. My conscience was desensitized and my sexual appetite entirely controlled my actions." He then goes on to tell how he sexually abused then killed his boy victims.

V. Kline, *Pornography Effects: Empirical & Clinical Evidence* 15 (1988) (available from the Department of Psychology, University of Utah, Salt Lake City, Utah 84112). (emphasis added)

The fact that a causal connection exists between viewing child pornography and criminal molestation indicates that this viewing activity is not confined to the realm of mere perusal of material, but it frequently enters into the domain of pathological activity mimicking what is perceived. *Commission on Pornography* at 130-131. Whatever the controversy about the nature of the consent of an adult participant in pornography,[9] child pornography at its inception is molestation. Doubtless, the young boy used for the photographs in the possession of the defendant in the instant case suffered substantial harm. The sole purpose of child pornography is to excite and incite adults into further molestation. This conclusion on harm to children is

[9] *See e.g.*, L. Lovelace & M. McGrady, *Ordeal, An Autobiography* (1980).

the fundamental reason why the possession of child pornography should not enjoy First Amendment constitutional protection.

B. Possession And Use Of Child Pornography Involves Substantial Harm To Children.

The initial harm caused to children by consumers of pornography is the use of such materials to lower the inhibitions of children. This portion of the "seduction process" may also involve the use of pornography as an instructional tool, since the molester will ask the child to pose as the performers have depicted, or ask the child to engage in the activities that are depicted. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984). As one investigator detailed,

> It was seduction. It was at their own choosing that they looked at the magazines. Once the pedophile realizes that secret would be kept, the next time the children would visit, they would see another type of magazine, something like *Schoolgirls*, *Lolita* or, again, if you are a boy lover, something like *Piccolo*.
>
> These magazines depict children in the act of sexual molestation, oral copulation, sexual intercourse, sodomy, fondling, and masturbation. When looking at this material, the children appear to be enjoying it. They would be forced into it and. again, the children would look at the magazines or movies, videotapes, photographs of other children, and would question, "Doesn't this hurt, isn't this wrong?"
>
> And the pedophile would demonstrate that it doesn't hurt, that it's a good feeling, a tickling sensation. This is the beginning of the molestation.
>
> The primary purpose of child pornography is to lower the inhibitions of the child, to show the children that other children are engaged in this type of activity, that it's a normal practice, that children should be photographed this way, that there is nothing wrong with it.

Lt. Thomas Rogers, testimony submitted to the Attorney General's Commission on Pornography, Washington, D.C (November 20, 1985) (available at the National Archives in

Washington, D.C.). This seduction technique was also recognized in the Surgeon General's Report at 14:

> Involvement with pornography does seem to have a place in the dynamics of sexually exploited children. Pornography has been used by adults to teach children how to perform sexual acts and to legitimize the children's participation by showing pictures of other children who are "enjoying" the activity. In some cases involvement in the production of pornography has led to other sexual activity; in others, pornography involvement has followed sexual activity.

The cycle of sexual exploitation of children has at its center pornography for enticement, entrapment, and instruction. O'Brien, Child Pornography 1, 89-90 (1983). See Also, *Commission on Pornography* at 138. Pornography is initially shown to the child for "sex education." Various mild forms of pornography, sometimes involving child imagery in adult mens' magazines,[10] is used by the molester to raise the curiosity level of children who are often surprised and bewildered about the sex act. *Id.* The next step in the cycle is to utilize pornography to attempt to convince the child that explicit sex is acceptable, even enjoyable. *Id.* Child pornography is then used to convince the child that other children participate in sexual activity with adults or peers. *Id.* While the child may not comprehend yet that he/she could be personally involved, the seduction process

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[10] An exhaustive study done at American University revealed that from 1954 until 1984, images linking children with sex significantly increased in the more "common" forms of pornography. In all, the research team counted 6,004 images linking children with sex, or an average of 8.2 times in each issue of *Playboy*, 6.4 times in each issue of *Penthouse*, and 14.1 times in each issue of *Hustler*. Received both by juvenile and adult readers, newsstand available child imagery in the context of erotica/pornography increased nearly 2,600% from 1954 to 1984. Nearly two-thirds of the child scenarios were sexual and/or violent; the dominant age bracket was 3-11 years; girls were more prevalent than boys and most likely associated with adult males. Close to 1,000 sexual scenarios included children with adults; 80% of the children were actively involved in all scenes; and each magazine portrayed children as unharmed and/or benefited by adult-child sex. The conclusion of the study was that child/adult sex was portrayed as glamorous, thereby enhancing the impression that these activities are harmless. J. Reisman, *Images of Children Crime and Violence In Playboy, Penthouse and Hustler Magazines*, Executive Summary 8 (1987) (available at the Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice).

is slowly lowering the child's inhibitions and resistance. *Id.* Continued showings of child pornography will lower the natural inhibitions and conscience of the child to a point where touching or kissing of the child may be accomplished by the perpetrator. *Id.* Some of these sessions eventually progress to more explicit sexual activity between the child and the adult or other children using child pornography as instructional aids. *Id.* Finally, still photographs in a "modeling session", home video movies or professional filming occur for blackmail,[11] commercial sale, personal collection of memories, future stimulation, trade with other molesters or use to continue the cycle of abuse with other children.

Another researcher describes the number of uses associated with child pornography to include the following:

> 1. *Blackmail:* Pimps view child pornography as a working tool by which they can acquire new hustlers or extort money from customers through blackmail. A pedophile may use photographs or films of his underage victims to blackmail them into silence. Pornographers also keep negatives and copies of their materials to guarantee the cooperation of exploitive parents;
>
> 2. *Profit:* Many who participate in child pornography do so because it generates wealth. These exploiters may personally have no sexual interest in or enthusiasm for minors;
>
> 3. *Instructional Aids:* An exploitive adult often uses adult and child pornography as an instructional aid to indoctrinate victims into various sexual practices. The exploitive adult also uses the pictures to demonstrate that such behavior is permissible: "If other adults and other children do this sort of thing, then it must be alright;"
>
> 4. *Self Gratification:* Child pornography either sparks or contributes to a heightened state of arousal preparatory to masturbation;

[11] One of the lures used by the adult is to introduce the child into illegal adult activities in addition to the sexual activity. The children would be given cigarettes, beer, liquor, and drugs. The adult would then use this information to threaten the children through betrayal. The adult may threaten to tell the child's parents.

Burgess, Groth, and McCausland, *Child Sex Initiation Rings*, 51 Amer. J. Orthopsychiat. 110, 114 (1981).

> 5. *Conditioning:* The exploitive adult uses kiddie porn to lower a minor's inhibitions and resistance to sex. With proper reinforcement, the victim can be conditioned into a state of acceptance of his or her exploitive situation;
>
> 6. *Advertising:* A procurer often uses pornographic or suggestive pictures of his hustlers to entice customers;
>
> 7. *Collections:* Most hard-core pedophiles possess an extensive collection of adult and child pornography. The value of such merchandise is relative to and depends upon the collector's particular sexual tastes;
>
> 8. *Sexual Record:* Some exploiters use pornographic photographs or films of victims to record their sexual encounters. Visual evidence of sexual accomplishments serves a variety of secondary functions, including blackmail, masturbation, profit, and instructional aid; and
>
> 9. *Access:* The mere possession of child pornography is frequently sufficient to provide an exploiter with access to other offenders and markets. These materials are helpful in terms of profit-making, ordering additional pornography through an exchange, and as a sign of good intentions with fellow exploiters. Simply put, child pornography is the currency of exchange and, in many instances, is the medium of communication among exploiters in the private and public child sex markets.

D. Campagna and D. Poffenberger, *The Sexual Trafficking in Children*, 118 (1988), [hereinafter *"Sexual Trafficking"]*. An additional use of child pornography magazines is as a training manual for finding and seducing children, communicating with other pedophiles, justifying child sex and instructing on how to avoid detection by law enforcement. M. Mawyer, *Silent Shame*, 34-36 (1988).

From a very early age children are taught to respect and believe information contained in books and will thus have the same beliefs about child pornography. *Commission on Pornography* at 150.[12] While a small child may be totally illiterate due to his age or education, a picture can nonetheless communicate a multitude of various ideas and concepts to him.

[12] Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. *Commission on Pornography* at 150, n. 531.

The child pornography problem is not simply going to disappear. That is because the demand remains high, and the supply of potential victims seems inexhaustible as well. *Commission on Pornography* at 135. *Id.* at 200.

Child pornography is also viewed as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors. K. Lanning, *Collectors In Child Pornography and Sex Rings* 86 (A. Burgess ed. 1984). Child pornography, which may have originated as a home-made item, may eventually be sold to a commercial child pornographic publication. *Id.* Much of the commercially produced child pornography is produced in another state (other than the residence of the possessor) or outside the United States; *Subcommittee on Child Pornography* at 4-16, 95-100; R. Lloyd, *For Money or Love: Boy Prostitution in America* 89-90 (1976). This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[13]

The evidence in the instant case suggests that the defendant may have obtained or sold the pornographic photographs of the young boy which he had in his possession through the mail. *Appellee's Motion to Dismiss or Affirm* at 3-4. The underlying implication is that the young boy who was depicted in the photographs was victimized by more people than the individual who shot the photographs. Such visual depictions are nothing more than actual records of child molestation. To stop such victimization, the possessors of such materials must be deterred from the ownership, proliferation and republication of such photographs by the threat of criminal prosecution.

Moreover, to stop the harm associated with possession and use of child pornography, all incentives for other parts of the chain, i.e. production and distribution, must be removed and the deterrent for possession itself must be increased. *Meadows*, 28 Ohio St.3d at 49. Criminal possession laws accomplish

[13] During an investigation in Los Angeles California, police found a mailing list of 5,000 customers of a child pornography distributor. *Commission on Pornography* at 154, n. 586. *See also Sexual Trafficking* at 119-139; *Subcommittee on Child Pornography* at 45-52.

both of these goals and their enforcement will substantially reduce the harms to children which are associated with consumption and use of child pornography.

C. Children Suffer Severe Psychological And Physical Harm From Production And Distribution Of Child Pornography.

(i) Psychological Harms To Children From Production.

Substantial evidence has accrued over the years about the injuries inflicted on children as a result of their participation in the manufacture of pornography.[14] The effects of being a subject in child pornography can be devastating.[15] Children who are used to produce pornography suffer harmful effects similar to those experienced by incest victims. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980). Such effects may include depression, guilt, and psychologically induced somatic disorders. *See e.g.*, R. Lusk and J. Waterman, "Effects of Sexual Abuse of Children," in *Sexual Abuse of Young Children* 101-118 (K. MacFarlane and J. Waterman eds. 1986). These children may grow up to lead a life involving drug abuse and prostitution. Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am J. Orthopsych. 237 (1978). More tragically, children who are sexually abused are more likely when they reach adulthood

[14] The *Ferber* Court explained *inter alia* as follows:

> It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults . . . . [S]exually exploited children [are] predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution . . . . Sexual molestation by adults is often involved in the production of child sexual performances. When such performances are recorded and distributed, the child's privacy interests are also invaded." *Ferber*, 459 U.S. at 758 n. 9. (Citations omitted.)

[15] In western society there is virtual unanimity that early adult/child sexual activity causes harm to the child. *See e.g.*, U.S. Dept. of Health and Human Services, *Child Sexual Abuse: Incest, Assault, Sexual Exploitation* 7 (1981); R. Holmes, *The Sex Offender and the Criminal Justice System* 91-103 (1983).

to victimize young children, particularly their own.[16] In fact, the recidivism rate for pedophile offenders is second only to exhibitionists. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271 (3rd ed. 1980).

One study done on 12 girls between the ages of six through nine who had suffered sexual molestation found an extensive aftermath of psychological trauma which was termed "post-traumatic stress disorder." The various manifestations of this disorder in the young girls was a dissociation from the event, fragmentation of their sense of self, suppression (only able to recall the molestation when provided specific stimuli), "trauma encapsulation" (functional management of one's daily existence while not disclosing the traumatic event), and "compartmentalization" (the event is remembered and in conscious awareness; but it may only be expressed to others in a neutral third person narrative). Burgess, Hartman, Wolbert, and Grant, *Child Molestation: Assessing Impact in Multiple Victims*, 1 Archives of Psychiatric Nursing 33-39 (1987).

Child sexual abuse frequently results in identifiable behavioral changes caused by emotional distress. J. MacDonald, *Rape Offenders and Their Victims* 120-145 (1971); Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law* 684 (R. Slovenko ed. 1965); Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 Psychiatric Q. 100-103 (1956). Yet, even though child physical and sexual abuse often provide fairly observable indicia of the abuse, perhaps fewer than six percent of these cases are reported. Prager, *Sexual Psychopathy and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49, 62 (1982); Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 Dick. L. Rev. 691-719 (1985). One study found that young children fail to speak out about sexual molestation

[16] *See e.g.*, D. Finkelhor, *Child Sexual Abuse: New Theory and Research* 47 (1984); Berliner, Blick, and Buckley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in ABA National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law* (5th ed. 1984); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969).

because they believe they did something wrong to bring about the abuse. S. O'Brien, *Child Abuse: A Crying Shame* 18 (1980).

Child sexual abuse and the production of child pornography are insidious because both prey upon and exploit a child's insecurities. This is an important factor in the area of criminal enforcement of child pornography laws because more often than not the whereabouts of the victim will not be available. As one study noted,

> Some experts on the issue of sexual abuse of boys believe that about 2.5 to 5% of the male population is sexually victimized in childhood or early adolescence. Nationwide, in 1979, there were approximately 22 million boys under age 13. If one uses the base figure of 2.5 to 5% victimization, then current victims would be 550,000 to 1,100,000. And if the rate of new cases is fairly constant, one could expect to see 46,000 to 92,000 new cases of sexual abuse of boys each year. Yet the figures from the National Incidence of Study of Child Abuse and Neglect estimated that in 1979 approximately 7,600 cases of sexually abused boys were known to professionals across the country (only half of these became official reports). *This suggests that as few as one in six or one in twelve boys who are sexually abused come to the attention of a professional.* (Emphasis added.)

S. O'Brien, *Child Pornography* 23 (1983), citing D. Finkelhor, *Children in Crises* 3-4 (1982).[17] The realities of the child pornography production and distribution network are invidious and surreptitious. It is difficult, if not impossible, to ascertain the origin of a great deal of pornographic material. It is equally impossible to locate the photographed child. Therefore, requiring direct scienter of a child's age in a particular photograph to convict a pedophile for possession would emasculate any law enforcement efforts.

(ii) Physical Harms To Children From Production

Many children also suffer physical harm as a result of the premature and inappropriate sexual demands placed on them.

[17] It is estimated that between 600,000 and 1,200,000 children are sexually abused and drawn into the world of child pornography every year, although estimates vary because experts believe that 50 percent or more of the child sex abuse cases are never reported. D. Wildmon, *The Case Against Pornography* 61 (1986).

Child Pornography at 3. Among the physical injuries suffered by children in the production of pornography are sexually transmitted diseases. "[T]he odds of contracting sexually transmitted diseases are very high—particularly because performers do not even have the option of using condoms or other "safe sex" techniques." *Commission on Pornography* at 236. A letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography put the situation this way,

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a painful vagina, stretched many times its normal size because her father used her for sexual gratification. This father was another pornography addict.

Commission on Pornography at 209.[18]

Violence and criminal activity are common ingredients in the commercial aspects of child pornography. One producer and distributor was reported to have made five to seven million dollars in his own child pornography business, while other witnesses before Congress described the kidnapping of small children by pornographers, and even their sale by parents. *Sexual Exploitation of Children*, Hrgs. before the Subcomm. on the Judiciary, H. Rep. 95-63, 1st Sess. (1977).

The actual depiction of children in pornography belies the gruesome reality of child molestation. Child psychologist Dr. James Dobson, a commissioner on the 1986 Attorney General's Commission on Pornography, described how his knees buckled and tears came to his eyes as hundreds of photographs were presented to the Commission depicting "pitiful boys and girls with their rectums enlarged to accommodate adult males and their vaginas penetrated with pencils, toothbrushes, and guns." J. Dobson, "Enough is Enough," in *Pornography, A Human Tragedy* 116 (1986).

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[18] Health officials have been alerted for over a decade that infantile gonorrhea is an indicator of sexual assault. S. Sgroi, *Kids With Clap: Gonorrhea as an Indicator of Child Sexual Assault*, 2 Victimology 251-267 (1977); S. Sgroi, *Pediatric Gonorrhea Beyond Infancy*, 8 Pediatric Ann. 5 (1979).

Another author described two films which exemplify both the physical and psychological horror of children exploited for pornographic purposes,

> In a court sentencing in Honolulu, spectators viewed two-eight-minute "kiddie porn" films the defendant was accused of distributing. The first film involved an adult male having sex with a girl about 9 to 11 years old. The action began with the man watching the little girl playing in the park, then swiftly moved to a nude shower scene. From there, it moved to a bedroom, with close-up shots of the girl's hymen intact, then the sex act, followed by shots of the girl's broken and bleeding hymen. The second film, tilted "Lolita Love," depicted an 8-year-old girl having sex with an adult male. It focused on the fear the child experienced as she discovered what she was being directed to do. A woman, thought to be the girl's mother, appeared in subsequent scenes. The girl, obviously taking directions from the two adults, reacted with apparent surprise and fright to an ejaculation scene.

S. O'Brien, *Child Pornography* 28 (1983); *Honolulu Star-Bulletin* A2 (25 March, 1981).

The end-result of pedophiles acting-out pornographic sexual/sadistic depictions of children which they view is death. One series of child pornography photographs shown to the Attorney General's Commission on Pornography "focused on a cute, nine-year old boy who had fallen into the hands of a molester. In the first picture, the blond lad was fully clothed and smiling at the camera. But in the second, he was nude, dead and had a butcher knife protruding from his chest." *Commission on Pornography* at 505. Cases have been reported in which a sex-related murder may have been patterned after a depiction found in a pornographic magazine or film. For example, the *New York Times* reported:

> The December 1984 issue of *Penthouse* carried this eroticized torture into the 'men's entertainment' forum with a series of photographs of Asian women bound with heavy rope, hung from trees, and sectioned into parts. It is not known whether this pictorial incited a crime that occurred two months later wherein an eight year old Chinese girl living in Chapel Hill, North Carolina, was kidnapped, raped, murdered and left hanging from a tree limb.

New York Times (Feb. 4, 1985). Witnesses before the Attorney General Commission on Pornography described the influence they perceived pornography had in their criminal activities or the crimes others had committed:

> The day came when I invited a small neighborhood boy into my apartment, molested him and then killed him in fear of being caught. Over the next few years I kidnapped, sexually abused and murdered four other boys.
>
> Pornography wasn't the only negative influence in may life, but its effect on me was devastating. I lost all sense of decency and respect for humanity and life.

Commission on Pornography at 208. Every week the newspapers carry stories about brutal sex related murders of small children. It is no mystery where many of these killers get their inspiration from.

(iii) Harms To Children From Distribution

Distribution and sale of child pornography harms children in ways which some researchers believe are more severe and long lasting than harm from production.[19] The *Ferber* court noted as follows:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.' Shouvlin, *Preventing the Sexual Exploitation of Children, A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981).
>
> ('[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions'): Note. *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as Use in Pornography) (increases the emotional and psychic harm suffered by the child').

Ferber, 458 U.S. at 759 n. 10.

[19] As one study has commented; "[f]requently a person hiring a child prostitute (or paying a child for sexual acts) will also record the activities. These photographs, tapes, or films are then reproduced and sold, distributed, or exchanged with other adults." National Center on Child Abuse and Neglect, *Sexual Abuse of Children: Selected Readings* at 3-4 (1980) (hereinafter "Child Pornography Study").

Child pornography has a life of its own. The depictions are timeless and may be distributed and circulated for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again. The harm to children from pornography occurs as a result of the existence of the material itself. According to the Commission on Pornography, "the enactment of criminal penalties for the possession of child pornography is essential if these harms outlined in *Ferber*, 458 U.S. at 749, are to be effectively curtailed." *Commission on Pornography* at 150-151.

II. NEUROCHEMICAL EVIDENCE SHOWS THAT PEOPLE REACT DIFFERENTLY TO PICTURES THAN THEY DO TO WORDS RAISING NEW FIRST AMENDMENT CONSIDERATIONS[20]

Visual data, whether good or bad, true or false, appears to be processed as "truth" immediately, forcefully and with some degree of permanence, while competing print/speed is processed feebly, or in some cases not at all.[21] While visual depictions of child exploitation should be treated more harshly than written word because of its harm to the child victim, perhaps the negative and more powerful effect of visual image versus the printed word on the viewer/reader gives additional weight to banning pictorial possession of child pornography.

As was explored above, it is the use of pictures which manipulate and exploit children into participating with an adult in a sexual act. There is a growing body of scientific neurochemical research which shows that pictures are processed and retained by the brain in a different manner than the written word. At least in the context of pictorial child pornography, therefore,

[20] Amici acknowledge and thank Dr. Judith Reisman for her valuable assistance in the development of this concept.

[21] *See* D. Galin, *Educating Both Halves of the Brain*, 53 Childhood Education 17 (1976).

the Court should examine written First Amendment activity in a different light from pictorial activity.

Neurological research has shown that the brain is divided into two halves or hemispheres, the left and right, and each half of the brain performs functions. One half of the brain primarily processes purely congnitive (written) information while the other half primarily processes visual information. As one neurologist explains,

> The two cerebral hemispheres are differently specialized, each performing a variety of tasks of which the other is either incapable or able to accomplish with only marginal facility. The left hemisphere is specialized for language comprehension and execution, verbal memory, and the numerical aspects of calculation, whereas the right hemisphere is specialized for visual-spatial and visual perceptual function, nonverbal memory and comprehension, and execution of speech prosody.

J. Cummings, "Hemispheric Asymmetries in Visual-Perceptual and Visual-Spatial Function," in *Dual Brain: Hemisphere Specialization in Humans* 233 (D. Frank ed. 1985). In general, the left hemisphere is more important for language and motor skills, while the right hemisphere does better with visual and spatial functions. R. Restak, *The Brain* 248 (1984).

Research in the education field also demonstrates that there is substantively different responses by the brain to pictures than to printed words.[22] In much the same manner, advertisers are researching what stimulates the two hemispheres of the brain so that a product will be noticed and remembered. At least one study quite logically suggests that an advertising campaign consisting of both written words and pictures may have the most success. Appel, Weinstein, and Weinstein, *Brain Activity and Recall of TV Advertising*, 19 Journal of Advertising Research 8 (1979).

A mass communication specialist noted: "The printed word no longer has the power it once did . . . the addictive, distortive

[22] L. Harris, "Right-Brain Training: Some Reflections on the Application of Research on Cerebral Hemispheric Specialization to Education," in *Brain Lateralization in Children* 211 (1988).

nature of images are vitally important realities within which to address the issue of freedom of speech." J. Reisman, *Freedom Of Speech as My Theology in Electronic Environment*, 3 New York Review of Law and Social Change, 275-278 (1979). At the very least, it is time to seriously reconsider the 19th century position that words and pictures are to be equated on the same First Amendment plane because they effect people in the same manner. The common-sense reality of the situation (and now a growing body of scientific research) is that they do not, and therefore, different First Amendment protections should be afforded to each. It is no accident that pedophiles revere the picture more than the word. The pictures of molestation stimulate them on a deeper and stronger level, be it neuro-chemical or psychological. The exploitation of a child in a photograph, movie, or video is clear, devastating, and it retains its depraved potency for those that possess and view it.

It is time to stem the tide of this terrible holocaust which claims thousands of innocent children as its victims. Possession of pictorial child pornography cannot be given the same First Amendment protection as written depiction. Intuition follows the old adage that "a picture is worth a thousand words." Unfortunately, a single photograph of a molested child speaks volumes about the tragedy that has befallen that child.

III. CRIMINAL LAWS AGAINST POSSESSION OF CHILD PORNOGRAPHY DO NOT VIOLATE *STANLEY* V. *GEORGIA* AND ARE CRITICAL TO LAW ENFORCEMENT TO ERADICATE CHILD PORNOGRAPHY AND THE CORRESPONDING CHILD MOLESTATION

Stanley v. *Georgia*, 394 US 557 (1969) has been repeatedly raised by criminal defendants as the Supreme Court case which constitutionally prevents passage of laws against possession of child pornography. The Ohio Supreme Court in *Meadows*, 28 Ohio St.3d answered this question persuasively by stating:

> Thus, *Stanley*, has always stood for—and still stands for—the proposition that the state may not, consistent with the First Amendment, regulate the mere private possession of material in one's own home merely because it is obscene. However, it is also significant to our inquiry that Justice

> Marshall cautioned at fn.11 of his majority opinion in *Stanley* that the Court did not '. . . *mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.*' (Emphasis added) *id.* at 568 (Emphasis added). Rather, it was recognized in the *Stanley* opinion that '*there could be cases involving other subjects where . . . compelling reasons may exist for overriding the right of the individual to possess those materials.*' (Emphasis added) *Id.*

Meadows, 28 Ohio St.3d at 46; *See also Felton*, 526 So.2d at 639-640.[23]

The interest which the state of Georgia unsuccessfully asserted in *Stanley*, inter alia, was its right to protect the individual possessor's mind from the effects of obscenity and to prevent future deviant sexual behavior which may be linked to exposure to obscene materials. *Stanley*, 394 U.S. at 565-566. Addressing that point the court in *Meadows* concluded:

> Unlike the obscene material considered in *Stanley*, *Miller*, et al., child pornography involves, by its nature, the physical mental and sexual abuse of, seduction and harmful exploitation of children. *The depictions sought to be banned by the state are but memorializations of cruel mistreatment and unlawful conduct.* Additionally, such material would continue to exploit and victimize the children shown by haunting them in the future. *Ferber* at 759 fn.10. We believe the interest of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, *comprise exactly the type of 'compelling reasons' justifying a 'very limited' First Amendment intrusion envisioned by the Stanley* court. At the same time, the cost to the individual's right to free speech, privacy and thought, caused by the state's banning of visual mementos from an episode of sexual abuse of a child, is slight. Moreover, the

[23] *See* Note, *Child Protection Act of 1984, Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 Okla. City U.L. Rev. 121 (1985), *Stanley* v. *Georgia*, 394 U.S. 557 (1969), would not be a bar to a law prohibiting possession of child pornography).

> content value of such material is trifling and alternative means of stimulation exist."[24]

Meadows, 28 Ohio St.3d at 50, 503 NE.2d at 703 (emphasis added). *See also Felton*, 526 So.2d at 636, aff'd., 526 So.2d at 641; *Geever* 522 NE.2d at 1207.

Unlike *Stanley*, where the Court determined there was no empirical data *at that time* to positively link the private possession of obscenity with deviate sexual behavior or crimes of sexual violence, the private possession of child pornography[25] has clearly been shown to involved direct harm to the children. These direct harms include: (1) harm to the children who produced the original pictures; (2) harm to children from circulation of the material; (3) harm to the children seduced by the child pornography into further molestation; and (4) harm to the children which are then captured again on film for the profit and pleasure of the molester. At that point the molester begins the cycle of child pornography/exploitation anew with his new child victim's pornographic pictures.

Another dissimilarity between *Stanley* and this case was articulated by the Illinois Supreme Court in *People* v. *Geever*,

> The purpose of the statute, unlike that in *Stanley*, is not to limit the individual's freedom of thought and mind in his own home, nor is the purpose to regulate the "moral content" of the depiction described . . . The purpose [of child pornography possession statutes] is to prevent the sexual

[24] In this regard, the *Ferber* majority noted as follows at 762-763: "We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work . . . If it were necessary for literary or artistic value, a person of the statutory age who perhaps looked younger could be utilized. *Meadows*, 280 Ohio St.3d at 50 n9.

[25] The available research relied on by this Court in *Stanley* to conclude that obscenity is not likely to injure either participant or viewer is both seriously questioned in terms of methodology and contradicted by later studies. *See e.g.*, Wilson, "Violence, Pornography, and Social Science," in *The Pornography Controversy* 233-38 (R. Rist.ed. 1975); *Commission on Pornography* at 38-46. Several experts now report a connection between viewing violent obscenity and committing violence on women. *See generally, Pornography and Sexual Agression* (N. Malamuth & E. Donnerstein eds. 1984).

> abuse and exploitation of children by "drying up" the market for child pornography. The incentive for the production and dissemination of child pornography is the ability to sell or distribute the pornography to the ultimate customer or possessor. *In prohibiting without restriction possession of child pornography, the legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography.*

522 NE.2d at 1206 (emphasis added).

From a law enforcement perspective, possession laws are critical weapons to combat the child pornography network and cycle of child sexual victimization. *Child Pornography* at 10. The Child Protection Act of 1984 and other similar state laws which incorporated *Ferber* successfully curtailed the organized commercial industry of child pornography driving the remains underground. However, the demand continued to increase in the pedophile network as the number of child molesters grew from the cycle of victimization. The "cottage industry" of production and distribution is more difficult to pinpoint and investigate since it is conducted underground through a closed, surreptitious network. The possession and use is now the most visible vestige of the child pornography traffic. Moreover, child testimony against the molester is the normal evidentiary scenario in a child molestation case, and because of this they are extremely difficult cases to win. Trials for possession of child pornography can be easily won with only the pictures and law enforcement testimony. Without possession laws, the molester who is often the producer and distributor will be more free to use child pornography to seduce, molest and take pictures of children engaged in sexually explicit conduct. Moreover, without high risk and deterrent, the demand for child pornography will also rise.

Possession laws are also extremely useful to reduce the trauma which the judicial process places on children who testify in child molestation cases. This is because, as noted above, child pornography is often found in the molester's house. A prosecutor in this type of situation will have the discretion of pursuing two separate causes of action, one of which will not involve the testimony of the sexually abused child. Child pornography speaks for itself to juries and convictions are easily obtained without the use of the abused child's testimony.[26]

As in the drug abuse problem, possession laws against child pornography are critical for law enforcement because they break the cycle of abuse and help reduce demand. *Meadows*, 28 Ohio St. 3d at 54 (Holmes, J. concurring). Child Pornography has several noticeable similarities to contraband drugs, for which possession is an offense. *Id.*

First, when drugs and child pornography are illegally possessed and used, the primary victim is the consumer. The harm to secondary victims, however, is often direct and extensive. In the drug area, the consumer often commits crimes of embezzlement, theft, robbery, assault and murder in order to obtain more money for drugs. The harm to secondary victims from possession of child pornography is even more devastating since they include the molested child seduced into the sexual acts by pornography, the children further traumatized by the pornography's continuous circulation and the children further abused by their participation in the molester's production of child pornography *Meadows*, 28 Ohio St.3d at 54 (Holmes J. concurring). The state correctly punishes everyone in the chain of illegal drugs for the crime of possession and thus, the state should have the power to stop child victimization by banning possession of child pornography, *Id.*

Second, as with the problem of drugs, the purchaser and possessor of child pornography, who pays money for this procured misery, is a vital part of the production-distribution system. Such knowing actions give him equal guilt with the producer and the distributor. Those who purchase or seek out such materials are at the very core of the problem by knowingly creating a demand for the abuse. It is his ultimate enjoyment of the perverse and harmful acts recorded that fuels the entire industry. *Id.*

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[26] See, e.g., Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act (1981), 17 Wake Forest L. Rev. 535; Note, Child Protection Act of 1984, Enforceable Legislation to Prevent Sexual Abuse of Children, 10 Okla. City U. L. Rev. 121 (1985).

Finally, as Justice Holmes recognized in his concurring opinion in *Meadows*:

> Laws banning production and distribution are insufficient to halt the abuse of children. The act of selling these materials is guaranteeing that there will be additional abuse of children. *Ferber, supra* at 761 n. 13. It is not enough to pursue the producers and distributors since most of their activities have been forced underground. *See id.* at 760, n. 11.

Meadows, 280 Ohio St.3d at 55. The *Meadows* court concluded that,

> "the compelling state interests of preserving its children's privacy and protecting them from the cruel physiological, mental and emotional abuse caused by sexual seduction, exploitation and mistreatment occasioned by the [use of] child pornography, outweigh the [possible minimal] interest in possessing such visual depictions"

Meadows, 28 Ohio St.3d at 52.

Amici agree with the *Meadows* Court that it is time to end the horrific plight besetting the children of our nation by upholding the constitutionality of possession laws.

CONCLUSION

The Ohio Supreme Court's decision should be upheld to prevent the victimization and exploitation of children by the possession and use of child pornography stopped.

Datted: August 10, 1989.

MARK N. TROOBNICK*
JORDAN W. LORENCE
CIMRON CAMPBELL
Concerned Women for America
370 L'Enfant Promenade SW
Suite 800
Washington, D.C. 20024
(202) 488-7000

**Counsel of Record*

H. ROBERT SHOWERS*
Gammon & Grange
1925 K St. NW Suite 300
Washington, D.C. 20006
(202) 862-2000

WENDELL R. BIRD
1150 Monarch Plaza
3414 Peachtree Lane
Atlanta, Georgia 30326
(404) 264-9400

APPENDIX

APPENDIX

DESCRIPTION OF AMICI

Concerned Women for America

Concerned Women for America ("CWA") is a national, non-profit membership organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. . . .
>
> We are concerned about the increasing availability of pornography and the lack of judicial enforcement of existing laws.
>
> We are concerned about the morally deteriorating condition of the entertainment industry in our country and the increasing emphasis on violent and sexually exploitative programs.
>
> We are concerned about the alarming amount of violence which occurs in American families each year, particularly the high incidence of child, spouse, and elder abuse.
>
> We would like to see the strict enforcement of laws restricting the use and sale of pornography.
>
> We would like to see more education intended to reduce family violence, especially the sexual abuse of children.

Concerned Women for America supports the position of the appellee State of Ohio that possession of child pornography may constitutionally be made a criminal offense. Concerned Women for America urges this Court to adopt the analysis of the Ohio Supreme Court, Jurisdictional Statement at A-6, and uphold the decision of that court.

Focus on the Family

Focus on the Family is a Christian, non-profit organization that is committed to strengthening the emotional, psychologi-

cal and spiritual health of children and their families in the United States and throughout the world. Amicus President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Amicus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book "Pornography, A Human Tragedy" which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amicus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Amicus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

Family Research Council of America

Family Research Council of America, a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance and research for Focus on the Family. Together, their research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly effect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

The National Coalition Against Pornography

The National Coalition Against Pornography (N-CAP) was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With member representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity and child pornography and to implement a number of programs designed to eliminate them from our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; the S.T.O.P.! Campaign (Stand Together Opposing Pornography, an intensive media-based campaign developed by N-CAP to help local communities push for the elimination of illegal obscenity/child pornography through law enforcement); legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representatives and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. N-CAP has also been instrumental in the development of a number of other related groups. N-CAP was the catalyst in the

founding of the Religious Alliance Against Pornography (RAAP) in 1986. RAAP consists of the highest level leadership of nearly fifty denominations, faith groups and inter-faith organizations, all united around the single common objective of eliminating hardcore and child pornography. Members include leaders in the Roman Catholic, Jewish, Protestant, Greek Orthodox and Mormon communities. Dr. Kirk, President of N-CAP, also serves as the Chairman of RAAP.

The fundamental mission and purpose of N-CAP is in protecting children through the elimination of child pornography and obscenity. N-CAP was formed as a result of a group of local citizens and ministers in Cincinnati, Ohio who had seen and counseled firsthand hundreds of families devastated by illegal pornography.

N-CAP has a unique and special interest in the case before the Court. N-CAP is both located and active in the state of Ohio. N-CAP has provided substantial efforts in support of the enforcement of the statute before the Court.

National Legal Foundation

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms through education and litigation. The Foundation is dedicated to advocacy in support of a proper rendering of the First Amendment's guarantees.

Athletes For Kids

Athletes For Kids ("AFK") is a non-profit organization started in 1986 in the Commonwealth of Virginia by Brad Curl to address the illicit sex and pornography problem among teenagers with positive, demand reduction solutions. AFK represents over 100 top professional athletes and dozens of leading corporate executives who are concerned about the destructive impact of a ten billion dollar per year pornography industry which exploits women, children and men.

AFK has produced a video to use in school assemblies featuring the athletes and has introduced it in a nine city campaign in the spring of 1989. AFK will be showing the video in hundreds of schools in the coming year and holding leadership meetings in cities coast to coast. AFK's main purposes are to educate young people, train athletes to speak on the destructive effects of pornography and pre-marital sex and to rally city leaders to make a stand against pornography in their communities.

AFK is very concerned that the government does its job in prosecuting obscenity, child pornography and child exploitation and enforcing regulations against indecent broadcasts and telephone services.

AFK believes that the criminal laws against the possession of child pornography will significantly curtail child molestation and related harms which are inflicted upon America's besieged children.

The National Christian Association

The National Christian Association ("NCA") was started by Brad Curl in 1978 to provide leadership and organization to develop local leadership teams in over twenty (20) major cities across the nation to deal with the growing problem of pornography and child exploitation. NCA is especially concerned about the malfunctioning of new generations of children who are unnecessarily exposed to pornography on cable, video, movies, telephone (dial-a-porn and adult party lines) and through magazines. NCA seeks to stop child pornography which exploits and victimizes children in the production, distribution, consumption and use of child pornography.

NCA has worked with local prosecutors to enforce laws against adult bookstores, child pornography distribution and X-rated video distribution. NCA has received complaints about the impact of Dial-A-Porn and X-rated videos in instigating older children to molest younger children. NCA is also concerned about the use of child pornography, soft core and

hard core pornography by pedophiles to reduce inhibitions of children to engage in sexual activity with adults.

NCA started the National Pornography Awareness Week in 1982 and now the Pornography Awareness Week has hundreds of local decency, pro-family and religious organizations participating to stop pornography. The National Decency Forum sponsored by NCA is an annual event which includes over seventy (70) local and national organizations.

NCA is a non-profit national organization based in the Commonwealth of Virginia which has over 10,000 members who are committed to seeing child pornography, child exploitation and adult obscenity eradicating from the United States to preserve our most precious institution, the family, and our most valuable asset, our children.

The Berean League

The Berean League, based in St. Paul, Minnesota, was formed to establish a strong, well researched and effective voice to promote the use of Biblical principles in our government and community. It also fills the need of Christian citizens for concise and credible resources in important moral/social/political issues. The League's authority is scripture. It communicates what the Bible teaches while remaining teachable itself.

Supreme Court, U.S.
FILED
SEP 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5986

In The
Supreme Court of the United States
October Term, 1989

CLYDE OSBORNE,
Appellant,

v.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE CHILDREN'S LEGAL FOUNDATION

ALAN E. SEARS
DOUGLAS V. DRURY
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel of Record
Amicus Curiae

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CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of an amicus curiae brief by Children's Legal Foundation. (Appendix A).

INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation

and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has filed more than 50 amicus curiae briefs with this Court on virtually every major obscenity and child pornography issue before this Court in the past three decades. CLF attorneys have participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

The Foundation's Executive Director Alan E. Sears is the former Executive Director of the Attorney General's Commission on Pornography. In that capacity he oversaw and supervised the drafting of the Final Report with its Recommendation Number 45 that states adopt laws prohibiting the possession of

child pornography. The Commission, after more than two years of examining the issue from legal, moral, clinical, social scientific, and other relevant perspectives, concluded that possession of child pornography is so intimately connected to the acts of child molestation depicted that a prohibition on possession of such material was required.

Children's Legal Foundation is profoundly concerned with the victimization and exploitation of children by child pornographers. It believes the Ohio law at issue is a constitutional and necessary method of deterring the child abuse and molestation involved in every child pornography case.

INTRODUCTION

The harm inflicted upon children by child pornography gives the states a "surpassing" interest in regulating production, distribution and possession of the material.

Each time child pornography is produced, a child is sexually exploited. Reproductions of these acts are "crime scene photographs" and distribution of them constitutes continued exploitation of the child involved. The photographic reproductions are a permanent record of the abuse suffered by the children involved. They fear discovery by loved ones and blackmail by the producers and possessors of the photographs. In addition, child pornography in and of itself is an instrument of abuse. Pedophiles and other child molesters show this material to their intended

victims in an effort to portray such conduct as normal. There are no "innocent collectors" of child pornography. A child's constitutional right to privacy is violated by the production, reproduction, distribution and possession of the material.

Because of the pervasive nature of the extreme harm inflicted upon our society by child pornography, a state may constitutionally prohibit possession of child pornography. In determining that child pornography is outside of the scope of protection of the First Amendment, this Court recognized that states have greater leeway in the regulation of pornographic depictions of children. New York v. Ferber, 458 U.S. 747 (1982). The state has a compelling interest in safeguarding the physical and psychological well-being of children. The distribution of

photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of those children. The advertising and selling of child pornography provides an economic and social motive for the production of those materials. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with prior judicial precedent. See Ferber, supra.

All of the reasons above stated, for allowing the prohibition of production and distribution of child pornography also apply to its possession. The market for child pornography cannot be dried up without

curbing demand for the "product." By criminalizing possession and treating it as a form of contraband, the states can substantially "dry up" the market by lowering demand and taking away the economic and social incentives of the producers and distributors.

Criminalizing possession of child pornography does not violate the possessors right to privacy. Although the Constitution extends special safeguards to the privacy of the home, that protection is not without limitation. In Stanley v. Georgia, 395 U.S. 557 (1969), this Court found the constitution proscribed prosecution for possessing certain "obscene" materials, but did not express an opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials or in other locations than the home. Since that time, the

Court has viewed Stanley, supra, as explicitly narrow and precisely delineated; and has not been disposed to extend the precise, carefully limited holding of Stanley, supra.

There are additional constitutional concerns raised in the instant case that were not present in Stanley, supra. Stanley, supra weighed the interest of a possessors right to privacy in his own home against the right of the state to protect society from obscene material and to protect the individual's mind from the effects of obscenity. This case involves a persons right to privacy in his home as against state's surpassing interesting to protect its children from harm and the victim children's right to privacy. The balance of these interests must be struck in favor of the compelling

interest of the state and the privacy rights of the children.

Ohio constitutionally prohibited possession of certain types of child pornography in enacting O.R.C. 2907.323(A)(3). The Ohio Supreme Court authoritatively construed the statute to conform to the Constitution. The construction given the statute narrowed it, making it more difficult for the state to obtain a prosecution.

The Ohio statute is constitutional as applied to Appellant. Appellant objects to the Ohio Supreme Court's construction of the term "minor." However, he fails to note that under either possible construction, (as discussed hereinafter, p. 39) the children depicted in the pictures he possessed were minors. (The children depicted were 14 years old or younger.) Ohio Supreme Court did not "add a

scienter requirement" as claimed by Appellant. Such a requirement was already part of the statutory scheme. By noting that minors depicted in a state of nudity involved a "lewd exhibition" or a "graphic focus on the genitals", the Ohio Supreme Court properly construed the statute to meet constitutional requirements as set forth in New York v. Ferber, supra.

The statute is not substantially overbroad. This Court noted in Ferber that the overbreadth doctrine is "strong medicine", that it is employed with hesitation, and then only as a last resort. Application of the doctrine becomes even more attenuated where, as here, behavior moves from "pure speech" toward conduct and the conduct is within valid criminal laws that reflect a legitimate state interest. Appellant

has failed to demonstrate that the Ohio statute is substantially overbroad.

The fact that Appellant was convicted prior to the construction of the statute by the Ohio Supreme Court does not relieve him from the consequences of his conduct. Where a state appellate court adopts a limiting construction of a statute to cure overbreadth, that statute may be applied to conduct occurring prior to the construction, as long as the application affords fair warning to the Defendant. Appellant clearly had fair warning that his conduct would violate the statute.

Due to the great harms inflicted by child pornography, and the states surpassing interest in regulating it, possession can be constitutionally regulated. The Ohio statute is such a constitutional regulation of child pornography.

ARGUMENT

I. THE STATES HAVE A "SURPASSING" INTEREST IN REGULATING CHILD PORNOGRAPHY BECAUSE OF THE GREAT HARM IT INFLICTS UPON OUR CHILDREN.

The harm of child pornography extends far beyond the harm caused to the children injured in the production of the material. Child pornography should be treated as contraband and its mere possession should be a crime.

Pedophiles and child abusers use this material to draw children into a "cycle of pornography." First, pornography is shown to the child for "sex education." Second, pedophiles attempt to convince the child that explicit sexual activity is acceptable, even desirable. Third, the material is used to convince the child that other children are sexually active. Fourth, child pornography desensitizes; it

lowers a child's inhibitions. Fifth, some of these sessions progress to sexual activity. Sixth, photographs or movies are taken of the sexual activity. Finally, those photographs or movies are shown to other children, thus completing the cycle. Final Report of the Attorney General's Commission on Pornography, page 138 (See Appendix B).

This is not merely a discrete, limited threat. FBI Special Agent Kenneth Lanning, a noted expert in investigation of child sexual abuse, testified before the Attorney General's Commission on Pornography that pedophiles, "may be small in number, [but] they are a very serious threat to our society because they have a potential for large numbers of victims.... My experience has been [that] ... all preferential molesters or pedophiles ... collect child pornography

and/or child erotica...." Testimony of Special Agent Kenneth Lanning, Attorney General's Commission on Pornography hearing, Miami, Florida, 11/20/85, pages 230, 232.

This Court has noted that "[T]he use of children as...subjects of pornographic materials is very harmful to both the children and the society as a whole." (citation omitted). "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual disfunctions, and have a tendency to become sexual abusers as adults." (citation omitted). New York v. Ferber, 458 U.S. 747, 758 fn 9 (1982).

A. Child Pornography Is Produced By Sexually Exploiting A Child

Whenever child pornography is produced, a child is sexually used, physically abused or injured and

emotionally scarred. The use of a minor for most sexual activities is proscribed by state laws. Reproductions of these acts are "crime scene photographs." Many of the sexual acts depicted in child pornography are criminal even aside from the age of the minor children; for example many states still proscribe bestiality, sadomasochistic sexual acts, and various forms of sodomy. (See for example the Georgia and Virginia state criminal codes.)

B. Child Pornography Creates A Permanent Record Of Abuse Of The Children Involved

"Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life

knowing that the recording is circulating within the mass distribution system for child pornography." New York v. Ferber, supra at 759, fn 10 quoting Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981). "It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." Note, Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J.L.R., 295, 301 (1979).

In addition to the fear that a loved one may discover the material, a child may also, fear blackmail from the producer, collectors, or other adults; a fear that they will be forced to perform further acts lest the prior photographs be revealed. In recent years the

"exposure" and resulting harm even to adults who posed at an earlier age is well known. (One well known example is Miss America, Vanessa Williams v. Penthouse, see U.S.A. Today, July 4, 1986 (Life) at 1, Col. 1.

This continuing threat exacerbates the original harm; it is a separate and distinct harm, a continued molestation and abuse of the child.

C. Child Pornography Itself Is An Instrument Of Abuse

Pedophiles and other child molesters show child pornography to their intended victims in an effort to portray sexual conduct by children as normal conduct, something that other children do and enjoy. It is an attempt to reduce a child's natural inhibitions to such behavior. Pedophiles also use child pornography as an instructional tool. One victim, Mary Steinman,

described the abuse she received from her father as follows:

> He would look at his porno pictures almost every day, using them to get ideas of what to do to me or my siblings. I have had my hands tied, my feet tied, my mouth taped to teach me big girls don't cry. He would tell me I was very fortunate to have a father that would teach me the facts of life.
>
> My father had an easel that he put by the bed. He'd pin a picture on the easel and, like a teacher, he would tell me, This is what you're going to learn today. He would then act out the picture on me. As early as the age of four; my father would rent me out to other people for the purpose of sex.

P. Schlafly, ed. Pornography's Victims 108 (1987).

"The act of selling these materials [guarantees] that there will be an additional abuse of children." Ferber, supra, at 761, fn 13. (citation omitted)

D. Child Pornography Is Used For Illicit Purposes By Possessors

There are few, if any, "innocent collectors" of child pornography. It is used to aid in the sexual fantasies, to assist in masturbation and other forms of gratification of the possessor, and is used to lure and instruct child victims. The photographs which the offender possesses are records of a real child who was traumatized, terrorized, used and abused. In our society, there is no legitimate use for child pornography.

E. Production, Distribution And Possession Of Child Pornography Violates Legitimate Privacy Interests Of The Children Abused

"The victims' knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child. (citation omitted) Thus, distribution of the material violates the individual interest in avoiding disclosure of personal matters." (citation omitted)

Ferber, supra, at 759, fn 10. The victims privacy rights are violated repeatedly as the photographs are circulated, collected, used and reused by the pedophiles and child pornographers and continually distributed throughout the child pornography network.

Child pornography inflicts numerous, severe and continuing harms upon America's children and their privacy interests. Children cannot consent to either the sexual abuse or the photography. Pedophiles and child pornographers violate the children, photograph their violations for use in sexual gratification, and use those photographs to entice other children into this cycle of pornography. It is hard to imagine a more objectionable use of the most private parts of a child's body. The need to prevent these evils

gives the states a surpassing interest in protecting children by drying up the market for child pornography through regulation.

II. A STATE MAY CONSTITUTIONALLY PROHIBIT POSSESSION OF CHILD PORNOGRAPHY

This Court noted in Ferber, supra, the relationship between the distribution of photographs and films depicting sexual activity by children and the sexual abuse of those children. Id. at 761, fn 13. The only practical way to end this abuse is to dry up the marketplace of child pornography by "imposing severe criminal penalties on persons selling, advertising or otherwise promoting the product." Id. at 760. Possession is an integral, indeed the most important link in the child pornography chain. The mere existence of a "marketplace" creates a demand for more photographs which

creates a demand for more abuse which extends in an ever growing cycle.

This court has recognized that the state has a compelling, indeed a surpassing interest in stopping the production and distribution of child pornography. Id. at 757. Numerous courts have recognized that the only method of accomplishing this objective is to dry up the market. Felton v. State, 526 S.2d 638 (Ala. 1988), State v. Davis, 768 P.2d 499 (Wash. 1989), State v. Meadows, 503 N.E.2d 697 (Ohio 1986), People v. Geever, 522 N.E.2d 1200 (Ill. 1988). Although Ferber, supra was decided in the context of distribution of child pornography, the same problems exist and the same reasoning applies to the possession of child pornography.

A. The Ferber Rationale That Child Pornography Is Outside The Scope Of The First Amendment Permits States To Prohibit Possession Of Child Pornography.

Child Pornography is completely outside the scope of the protection of the First Amendment; it is an evil that the states may restrict. The inherent evils of child pornography overwhelmingly outweigh the "expressive interests" (if any) at stake. There is no valid argument that child pornography should have the protection of the First Amendment.

This Court began its First Amendment analysis of the child pornography issue in Ferber, supra, by noting that the test for obscenity as stated in Miller v. California, 413 U.S. 15 (1973) does not apply to child pornography. The Court recognized that the states have greater leeway in the regulation of pornographic depictions of children because: (1) the state has a compelling interest in safeguarding the physical and psychological well being of

a child; (2) the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of those children; (3) the advertising and selling of child pornography provide an economic motive for the production of those materials; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis; and (5) recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with the Courts earlier decisions.

This Court found that the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake, that no process of case by case adjudication is required. "When

a definable class of material ... bears so heavily and pervasively on the welfare of children engaged in its production,...the balance of competing interest is clearly struck and...it is permissible to consider these materials as without the protection of the First Amendment." 458 U.S. at 764.

This analysis is directly and appropriately applicable to the possession of child pornography.

In order to dry up the market for child pornography, the state must be able to reach the possessor, the last, but most important link in the chain. As long as there is demand for this material, it will exist. By punishing the end user, the consumer, the possessor, the one who creates demand, greater strides can be made toward drying up the marketplace than through

prevention or production and distribution alone.

Just as the production of child pornography is intrinsically related to child abuse, so is the possession. As noted in Section I, possessors of child pornography are often pedophiles and other child abusers who use the material to lower the inhibitions of their victims and to instruct their victims in forms of sexual humiliation, violence and abuse.

By criminalizing the possession of child pornography, by treating it as a form of "contraband", the states can further dry up the market by lowering demand and taking away the economic and social incentives of the producers and distributors. In addition, the production and distribution network and the class of possessors are not independent, but interrelated. Child

pornography is viewed as a commodity among pedophiles and child pornographers. Visual depictions are traded and sold between possessors. Final Report of the Attorney General's Commission on Pornography, page 150 (1986). Since these relationships are intertwined, the states can take away economic and social incentives and slow the distribution of child pornography by criminalizing possession.

As with production and distribution, the value of permitting possession of photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. Just as there are no legitimate reasons for production and distribution, there is no legitimate reason for possession.

Finally, recognizing and classifying possession of child

pornography as conduct unprotected by the First Amendment is not incompatible with this court's earlier decisions, including Stanley v. Georgia, 394 U.S. 557 (1969).

B. Criminalizing Possession Of Child Pornography Does Not Violate The Possessor's Right To Privacy

The Illinois Supreme Court noted in People v. Geever, supra, that, although the constitution extends special safeguards to the privacy of the home, that protection is not without limitation. 522 N.E.2d at 1205; (relying on Bowers v. Hardwick, (1986), 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140). Bowers held that the due process clause of the Fourteen Amendment does not confer a right of privacy to homosexuals to commit sodomy in the privacy of their homes.

Twenty states now have statutes criminalizing the private possession of

sexually explicit pictures of minors. The Ohio Supreme Court registered the first major decision on the validity of the possession statutes in State v. Meadows, 28 Ohio State 3rd 43, 503 N.E.2d 697 (1986) cert. denied 480 U.S. 936 (1987). The Ohio statute upheld in Meadows, O.R.C. 2907.322(A)(5) prohibits the possession of a photo of a minor "engaging in sexual activity" without requiring it to be obscene.

Both the defendant in Meadows, supra, and the defendant herein invoked this court's decision in Stanley v. Georgia, supra, in an attempt to wrap their conduct in constitutional protection. However, Stanley only protected the right to be free from prosecution for merely possessing "obscene" materials (pictorial or literary) within the home. As stated in Meadows, 503 N.Ed.2d at 700;

Thus, Stanley has always stood for -- and still stands for -- the proposition that the state may not, consistent with the First Amendment, regulate the mere private possession of material in one's own home merely because it is obscene. However, it is also significant to our inquiry that Justice Marshall cautioned at footnote 11 of his majority opinion in Stanley that the court did not '... mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.'" (emphasis added) Id. 394 U.S. at 568. Rather, it was recognized in the Stanley opinion that there could be cases involving other subjects where "...compelling reasons may exist for overriding the right of the individual to possess those materials." (emphasis added) Id. [emphasis by the court in Meadows]

The compelling reasons listed by this Court in Ferber, supra, for allowing the prohibition of production and distribution of child pornography also apply to the possession of child pornography and provide the compelling

reason for overriding the right of the individual to possess materials in his own home. Child pornography is exactly the type of "other types of printed, filmed, or recorded materials" which were not included under the protection of Stanley, supra. Though much material that is obscene involves abuse to the performers, and has other anti-social aspects, child pornography always involves harm to children for its production. This Court has categorically rejected the argument that Stanley, supra, should be extended beyond the specific facts of that case. In United States v. 12-200 Foot Reels, 413 U.S. 123, at 127-28 (1973), the Court ruled that Stanley, supra, is to be viewed as "explicitly narrow and precisely delineated"; the court was "not disposed to extend the precise, carefully limited holding of Stanley."

This court also emphasized the narrowness and limits of the Stanley, supra, holding in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-69 (1973).

Possession of child pornography does not raise the same constitutional concerns found in Stanley, supra. There, the court weighed the privacy interest of the possessor against the state's interests in protecting society from obscene material and to protect the individual's mind from the effects of obscenity and struck the balance in favor of the possessor of obscene material. Not only are the states' interests more compelling in regulating child pornography (Ferber, supra, at 757); but the competing privacy interests of the possessor and of the children involved must also be considered.

Children are legally incapable of consenting to their participation in the production of child pornography. Each time the material is reproduced, distributed, possessed or viewed, the child's right to privacy is violated. Therefore, the court must weigh the possessor's right to privacy not only against the state's compelling interest in protecting its children, but against the child's right of privacy. This Court has acknowledged that the victim's knowledge of publication of the visual material increases the emotional and physic harm suffered by the child and the fact that distribution of the material violates the individual interest in avoiding disclosure of personal matters. Ferber, supra, at 759, fn 10.

The balance of these interests must be struck in favor of the compelling

interest of the state and the privacy rights of the children and against the privacy rights of the possessor of child pornography.

The Ohio Supreme Court weighed the competing interests in State v. Meadows:

> We believe the interest of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, comprise exactly the type of 'compelling reasons' justifying a 'very limited' First Amendment intrusion envisioned by the Stanley court. At the same time, the cost to the individual possessor's right of free speech, privacy and thought, caused by the state's banning of visual momentous from an episode of sexual abuse of a child, is slight. Moreover, the content value of such material is trifling and alternative means of stimulation exists."

503 N.E.2d at 703. In our political history and under our law, the home has been regarded as a shielded place of

privacy. There are circumstances, however, which call for the individual's right to this sanctuary to be balanced against critical interests of society. For example, the person has no right to possess narcotics, heroin and other forms of contraband, even in the home. Child pornography should be similarly viewed as contraband.

When considering child pornography, the individual's assurance of full freedom of conduct in the home must yield, consistently with the Supreme Court's holding in Bowers v. Hardwick, supra, to society's "most compelling" interest to protect its children from the lasting harm of emotional and sexual degradation. People v. Geever, supra, at 1206.

Possession has been described as the most important link in the chain of distribution of child pornography. Id.

at 1206. The Attorney General's Commission on Pornography reviewed the factual and legal situation regarding child pornography and recommended that all 50 state legislatures amend laws, where necessary, to make the knowing possession of child pornography a felony. As noted above many state legislatures have followed the recommendation. Final Report of The Attorney General's Commission on Pornography, Recommendation 45, 150. See Appendix C, (1986).

Criminal punishment for the knowing possession and collecting of sexually explicit pictures of minors is necessary to prevent the further exploitation of those children whose permanent record of abuse forever haunts their privacy and mental health, and is necessary to prevent the use of the pictures to facilitate the seduction of other

children by the possessor and user of collections of these crime scene photos. These objectives require the possessors limited privacy interests to yield.

III. THE OHIO CHILD PORNOGRAPHY POSSESSION STATUTE, O.R.C. 2907.323(A)(3) IS CONSTITUTIONAL AND VALIDLY CRIMINALIZES NON-PROTECTED CONDUCT.

The Appellant has attacked the Ohio statute as constitutionally invalid as overbroad and as applied to him. None of the purported infirmities raised by Appellant withstand scrutiny.

A. The Ohio Supreme Court Authoritatively Construed Ohio Law In A Constitutional Manner

Appellant has challenged his conviction based on his claim that the Ohio Supreme Court "re-wrote" O.R.C. 2907.323(A)(3). However, Appellant fails to distinguish between a re-writing of a statute by a court and an authoritative construction of that statute.

As an initial matter, it should be noted that a full and authoritative construction of a state statute by the highest court of that state finds this court, for which the words of the state's highest court are in effect the words of the statute. N.A.A.C.P. v. Button, 371 U.S. 415, 417 (1963). Therefore, the issue before the court is not whether the Ohio court "re-wrote" the state statute, but whether the statute as authoritatively construed meets the requirements of the Constitution.

It will be presumed that the legislature acted in light of the provisions of the Constitution and did not propose to act inconsistently with its protections. Accordingly, a court must construe a statute as not offending the Constitution, provided the

construction is a reasonable one. People v. Geever, supra, at 1205.

In upholding the conviction of Osborne, the Ohio Supreme Court reasonably construed O.R.C. 2907.323(A)(3) to meet the constitutional requirements as enunciated in Ferber: the conduct to be prohibited is adequately defined and scienter is required on the part of the Defendant.

1. The Ohio Supreme Court Properly Construed The Term "Minor"

It is not required that every word of a statute be precisely defined. Pursuant to Ohio law, a term undefined by statute is to be accorded its common, everyday meaning. O.R.C. Section 1.42. The Ohio Supreme Court acted properly in defining a minor as a person below the age of eighteen, that being the accepted definition of the term "minor." Appellant attempts to demonstrate that

minority can mean something other than "below the age of eighteen" by citing O.R.C. 2907.04. However, that statute defines the age of consent for certain specified acts in Ohio, and does not attempt to define the term minority for all purposes. The mere fact that a legislature might not make it non-criminal or criminal to engage in certain acts between the ages of 16 and 18 or 18 and 21 years of age does not therefore limit the legislatures power to prohibit photographing, distributing or possessing photographs of such acts. As stated above, photographs may be even more harmful than actual sexual activities with or abuse of a child.

Appellant states that "had [he] known at the time of the trial the age of minority..., he might have made different decisions as to how to present his defense." This assertion cannot

withstand even the mildest scrutiny. No matter which definition of minority the Ohio Supreme Court adopted, the pictures possessed by Appellant involve children under the age of fifteen (record at 54 - see Appellee's Statement of the Case which is below any definition of "minority" under Ohio law thus obviating the need for any alleged "change in defensive tactics" based on the definition of "minor."

2. <u>The Ohio Supreme Court Properly Interpreted The Statutes Scienter Requirement</u>

Although O.R.C. Section 2907.323 is silent on the issue of scienter, O.R.C. Section 2901.21(B) provides that when a section defining a criminal offense does not specify a specific degree of mental culpability, a mental state of "recklessness" is required for the person to be guilty of the offense, unless there is a plain indication to

impose strict liability. Thus the statute meets the requirement that, in order to impose that criminal responsibility, there must be some element of scienter on the part of the defendant. New York v. Ferber, supra, at 765. The Ohio Supreme Court added no new provision nor added or changed any language; it merely read the statutory scheme as a whole and applied the scienter requirement as provided by Ohio statutes.

3. **The Ohio Supreme Court Properly Construed The Statute To Meet Constitutional Requirements By Applying The Statute Only When The Nudity Constitutes A "Lewd Exhibition" Or Involves A Graphic Focus On The Genitals**

The Ohio Supreme Court construed the elements of O.R.C. Section 2907.323(A)(3) to be consistent with the requirements of New York v. Ferber.

The statute states as follows: Illegal use of minor in nudity -

oriented material or performance. (A) No person shall do any of the following: (3) possess or view any material or performance that shows a minor who is not the persons child or ward in a state of nudity,...." The Ohio Supreme Court held that the statute as written was "not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions that constitute child pornography." This reading follows directly from the language of the statute prohibiting "nudity - oriented material or performance." This must mean something more than "mere nudity." The Ohio Supreme Court construed the terms as consistent with the United States Constitution. It defined it as "...such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals,...where the person depicted is

neither the child nor the ward of the person charged. State v. Young, 525 N.E.2d 1363, 1368 (1988). The Court arrived at this definition by reviewing the statute and the exceptions to the prohibited conduct:

> It is true that [the statute] does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that '...nudity, without more is protected expression...,' even where the subject depicted as a child [citing New York v. Ferber]. However, when the 'proper purposes' exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions...is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is not morally innocent, ie., the possession or viewing of the described material for prurient purposes. So construed, the statutes proscription is not so broad as to outlaw all depictions of

> minors in a state of nudity, but rather only those depictions which constitute child pornography.' Id. at 1357.

The statute as construed by the Ohio Supreme Court prohibits conduct which constitutionally may be proscribed. The statute upheld in Ferber, supra, prohibited "lewd exhibition of the genitals." Thus nudity can be prohibited, consistent with the Ferber, supra decision. The construction of the Ohio Supreme Court is plainly within such meaning.

B. O.R.C. Section 2907.323(A)(3) Is Not Substantially Overbroad

The Appellant asserts that the statute is substantially overbroad, citing Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Appellant's assertion is erroneous.

As an initial matter, it should be noted that the statute may be constitutionally applied to this

Appellant. Although Appellant tries to "soft peddle" the nature of the pictures involved in its conviction as "nude pictures" in his "personal photo album" the pictures were of total strangers to Appellant.

> The brown photo album contained numerous photographs of nude males of various ages and Osborne admitted that he had taken some of those photographs. (Joint Appendix of the judgment rendered by the Ohio Supreme Court 12: hereinafter J.A.).
>
> * * *
>
> State's Exhibits 1A through 1C were Polaroid photographs, and State's Exhibit 1D had the notation on the back of the photograph of "Tommy - 13". (J.A. 9,11).
>
> State's Exhibits 1A through 1C depict the same young male child on a bed in various poses, which child Osborne stated was 14 years of age when the photographs were taken. (J.A. 13, 14, 16).
>
> In State's Exhibit 1A the 14 year old boy is depicted laying on his back in a provocative pose in a bed with his legs spread apart, and

with an erect penis that Osborne described as a "hard on" (J.A. 20). The boy is holding something in his hand that Osborne described as electrical, with a cord attached to it. (J.A. 20).

State's Exhibit 1B depicts the same 14 year old boy in an almost gymnastic pose on the bed with his hands behind his head and his arms looped between the inner part of the knee with his stretched and exposed anus in graphic focus.

In State's Exhibit 1C this 14 year old boy is depicted on the bed with his legs spread-eagled and in one of his hands placed into his anus is an item Osborne identified as a "dildoe", but noted that "you can't tell from the picture whether there's any penetration." (J.A. 21). On the bed in this shot is the same electrical device shown in State's Exhibit 1A that Osborne said looks like a sander. (J.A.21).

State's Exhibit 1D is a photograph of a different boy who is standing with his hands placed on his hips and a graphic focus on the male genitals. This photograph depicts the boy only between the shoulders and the knees. (J.A. 9). On the back of this Exhibit is the notation "Tommy - 13". (J.A. 9, 19). The

background in this photo matches the background in the three Polaroid photos of the 14 year old boy.

* * *

Osborne did not know the young boys in these photographs, and he was not their parent or ward. (J.A. 22).

Osborne mounted these four photos in his brown photo album, kept these photographs for at least three years, and periodically looked at them. (J.A. 15-16).

See, Appellees Statement of the Case.

In Ferber, supra, at 771, the court held that the substantial overbreadth doctrine of Broadrick v. Oklahoma, supra, applies to the First Amendment analysis of child pornography legislation. The court further noted that "the scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which the facial

invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then only as a last resort." Ferber, supra, at 769. The application of the overbreadth doctrine becomes even more attenuated where, as here, behavior moves from "pure speech" toward conduct and the conduct is within valid criminal laws that reflect a legitimate state interest. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence justify invalidating a statute on its face and

so prohibiting a state from enforcing the statute against conduct if its admittedly within its power to proscribe. Id. at 770. Such a law should not be held invalid for overbreadth unless it reaches a substantial number of impermissible applications. Id. at 771. As noted by Justice Scalia in his concurrence in Massachusetts v. Oakes, 491 U.S. ___, 105 L.Ed.2d at 505 (1989), "it is the burden of the person whose conduct is legitimately proscribable, and who seeks to invalidate the entire law because of its application to someone else to 'demonstrate from the text of [the law] and from actual fact' that substantial overbreadth exists.'" New York State Club Association v. New York City, 487 U.S. ___, 101 L.Ed.2d 1, 108 S.Ct. 2225 (1988) (emphasis added). Appellant has failed to demonstrate from the text and

from actual fact that the Ohio statute, as authoritatively construed by the Ohio Supreme Court "reaches a substantial number of impermissible applications."

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." Broadrick, supra at 613. Broadrick, upheld a constitutional challenge to political limitations on Oklahoma public employees and discussed at length the effect of a finding of "overbreadth" on the enforcement of a statute. As noted in Broadrick, where the construction of a statute creates a narrower standard it can continue to be enforced.

In the landmark case of Roth v. United States, 354 U.S. 476 (1957), wherein this Court first fashioned a modern test for obscenity, the Court upheld obscenity convictions of two men,

one under federal law and the other under a California statute. Both laws were very broadly written. The federal law prohibited every "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character" from being mailed. Roth, supra, at 479, n.1. The California law prohibited the production, sale or advertising of any "obscene or indecent" material. Id., n.2. This Court in Roth limited prosecution to "obscene" material that met this test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." That definition was more narrow than the statutes under which the defendants were charged and convicted. Yet the Court affirmed the convictions despite

announcing for the first time that very day a new constitutional standard.

Roth is directly applicable here. In this case, if the Appellant "charted his course of conduct" by the pre-Ohio Supreme Court construction of the statute, he could not possibly be prejudiced by prosecution under the constructive definition. It should be noted the the Ohio Supreme Court decision places a greater burden on the state and causes no prejudice to the Appellant.

Also see Pope v. Illinois, 481 U.S. 497, 501-02 (1987).

Nor can the fact that the Ohio Supreme Court construed the statute after conviction relieve Appellant from the consequences of his conduct. Where a state appellate court adopts a limiting construction of a statute to cure overbreadth, that statute may be

applied to conduct occurring prior to the construction, as long as the application affords fair warning to the defendant. Dombrowski v. Pfister, 380 U.S. 479, 491, n.7 (1965).

Appellant had fair notice that the conduct he engaged in was prohibited by statute. The pictures involved were not pictures of a "baby on a bear skin rug" but, as described above, involved nude depictions focusing on children with their legs spread apart, erect penises, adjacent dildoes, and exposed anuses.

The "fair warning requirement prohibits the states from holding an individual criminal responsible for conduct which he could not reasonably understand to be proscribed." Rose v. Locke, 423 U.S. 48, 49, (1975). It cannot be doubted that the statute provides sufficient notice that Appellant's conduct is proscribed;

therefore, his right to due process has not been violated.

The terms "lewd exhibition" and "graphic focus on the genitals" are not in themselves overbroad. This Court has already considered the construction to be given to the term "lewd." In U.S. v. 12 200-Foot Reels, 413 U.S. 123, 130 fn 7 (1973), this Court considered the terms "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" and stated that "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in Miller v. California, 413 U.S., at 25." Lower courts have also found the term "lewd" readily definable. In U.S. v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) the Defendant contented the term

"lascivious" was vague. The court held that "lascivious" is no different in its meeting than "lewd" a term whose constitutionality was specifical upheld in Miller, supra, and in Ferber, supra.

The term "graphic focus on the genitals" is closely related to the term "lewd." The statute upheld by this Court in Ferber included the term "lewd exhibition of the genitals" within the definition of "sexual conduct." 458 U.S. at 751. The Wiegand, supra, court defined "lasciviousness" as a characteristic of the exhibition and not a characteristic of the child herself; presented by the photographers as to arouse or satisfy the sexual cravings of a voyeur. Thus, the terms in the Ohio statute as construed provide clear limits to the conduct prohibited as required by Ferber, supra. The Ohio Supreme Court authoritatively construed

O.R.C. Section 2907.323.(A)(3) as consistent with the United States Constitution. It did not add any new elements to the crime nor did it re-write the statute in any way.

Appellant also complains because the statute exempts parents and artists. Appellant is neither a parent of the children depicted in his pictures nor a legitimate artist in possession of his work. The exception does not render the statute overbroad because it does not prohibit conduct which must be constitutionally permitted, but permits conduct which may be statutorally proscribed. Although it may not have been wise to exempt the classes exempted, that is a decision left to the legislature. Such exemptions are not uncommon in obscenity statutes. See Ripplinger v. Collins, 868 F.2d 1043 (1988) upholding the constitutionality

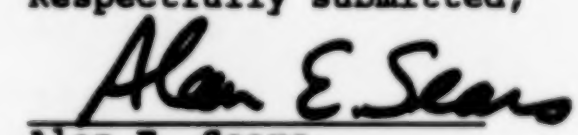
of the Arizona state obscenity statutes exemption of cable television. The following cases have also upheld sundry exemptions for clerks, projectionists, churches, schools, universities, libraries and museums on any one of several legislative goals. State v. Martin, 719 S.W.2d 522 (Tenn. 1986); 4000 Asher, Inc. v. State, 716 S.W.2d 190 (Ark. 1986); Com. v. Stock, 499 A.2d 308 (Pa.Super 1985); State v. Baker, 711 P.2d 759 (Kan.App. 1985); Com v. Ferro, 372 Mass. 379, 361 N.E.2d 1234 (1977); In re Kimbler, 100 Cal.App.3rd 453, 161 Cal.Rptr. 53 (1979); Com. v. Bono, 7 Mass.App. 849, 384 N.E.2d 1260; People v. Illardo, 48 N.Y.2d 408, 423 N.Y.S.2d 470, 399 N.E.2d 59 (1979); State v. Lesieure, 121 R.I. 859, 404 A.2d 457 (1979); State v. J.R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973). Indeed, various exemptions from

state obscenity statutes are the rule, not the exception. And see, A.L.I. Model Penal Code and Commentaries, § 251.4(3), Appendix B.

CONCLUSION

For the foregoing reasons, the Court should uphold The Ohio legislature's judgment that possession of child pornography should be ciminal, O.R.C. 2907.323(A)(3).

Respectfully submitted,



Alan E. Sears
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel for
Amicus Curaie

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 7th day of September, 1989, to:

RANDALL M. DANA
S. ADELE SHANK
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587

JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210

RONALD J. O'BRIEN
City Attorney
City Hall
90 West Broad Street
Columbus, Ohio 43215

All parties required to be served have been served.

Alan E Sears

ALAN E. SEARS
Counsel for
Amicus Curiae

APPENDIX A

Children's Legal Foundation

"protecting the innocence of children"

August 23, 1989

S. Adele Shank
Assistant Ohio Public Defender
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, OH 43266-0587

Re: Osborne v. Ohio, No. 88-5986

Dear Ms. Shank:

I am Legal Counsel for Children's Legal Foundation, a national, non-profit public interest corporation based in Phoenix. CLF has a 32-year history of opposing child pornography and obscenity, frequently in the U.S. Supreme Court, and desires to file an amicus curiae brief in support of the State of Ohio in the above-styled case. Pursuant to Rule 36 of Rules of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Federal Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Len L. Munsil
Legal Counsel

LLM/lak

Enclosures

I do X do not ____consent to the filing of an amicus curiae brief by Children's Legal Foundation in Osborne v. Ohio, No. 88-5986.

S. Adele Shank
Assistant Ohio
Public Defender

APPENDIX B

C H A P T E R

1 1

Child Pornography

INTRODUCTION

No clearer measure exists of the radical shift in the issues confronted by the Commission on Obscenity and Pornography in 1970 and those facing this one than the problem of child pornography. In its description of "the industries" producing sexually explicit material the 1970 Commission nowhere mentioned or alluded to child pornography,[307] and its Traffic and Distribution Panel reported that "the taboo against pedophilia . . . has remained almost inviolate" even in the hardest of "hard-core" materials.[308] The recommendations of the 1970 Commission included repeal of all laws restraining distribution of sexually explicit materials to children; no exception was stated for materials depicting children engaged in sexual conduct.[309]

This Commission, by contrast, has devoted a very substantial proportion of its time and energy to examining the extent and nature of child pornography. Indeed, one set of the Commission's hearings was devoted almost entirely to the problem, while extensive oral and written testimony on the subject was received throughout the year. No aspect of the pornography industry has more occupied the attention of Congress and the general public during the past decade, and this Commission has made a wide range of recommendations

for further legislative and public action. The very novelty of child pornography as a matter for public concern, however, requires at least a general overview of the rise of the "kiddie porn" industry, the nature of and the rationale for the governmental response to it, the effects on the children involved, and the contours of the industry's surviving components. That overview must begin with attention to what "child pornography" by definition *is* and what it is not.

Drawings of children engaged in sexual intercourse with adults date at least from ancient Greece,[300] and a graphic written description of child sexual abuse was to be found in seventeenth century France.[301] Yet although these portrayals or accounts might be deemed "obscene," and although they deeply offend modern sensibilities regarding the rearing and protection of children, they are not "child pornography" in the specific legal and clinical sense that term has acquired over the past fifteen years. As defined by the United States Supreme Court in the 1982 decision, *New York v. Ferber*, the category of "child pornography" is "limited to works that *visually* depict sexual conduct by children below a specified age."[302] It is clear from the Court's language, and in all statutory and scholarly definitions of the term, that "child pornography" is only appropriate as a description of material depicting *real* children.[303]

The basis for these limitations is evident from the very nature of the outrage child pornography engenders—anger over the sexual abuse of children used in its production. While concern over "pornography" generally has centered on the impact of sexually explicit materials on the *audience*, "child pornography" has been defined, and attacked, in terms of its effects on the children who appear in it. Thus, as the Court found in *Ferber*,

the category of "child pornography" is both broader and narrower than that of "obscenity." Broader in that it includes materials which are not "patently offensive," which do not appeal to the "prurient interest of the average individual, "and which show children in sexual conduct even as an incidental part of the work (rather than "taken as a whole").[206] Narrower, however, in that written materials are wholly excluded, as are visual materials which do not show *actual* children engaged in sexual conduct. Thus a rewrite of *Lolita* which included graphic descriptions of sexual activity with a young girl could never be "child pornography," nor could a fully explicit film of the novel which starred an adult actress playing the part of the young girl. Such a film which used a *minor* actress, however, could be "child pornography" even if not "patently offensive" by prevailing community standards, and (although this is less clear) even if it possessed serious artistic, literary, scientific or educational value.[207] In the context of "child pornography," alone among all the issues considered by the Commission, the definition of "obscenity" proclaimed in *Miller v. California*[208] and its progeny is wholly irrelevant. Indeed, the advent of "kiddie porn" in the years after *Miller* provides vivid illustration of the inadequacy of the concept of "obscenity" for protecting the interests of performers in sexually explicit material.[209]

The irrelevance of *Miller* to child pornography is loaded with some historic ironies, for it was later in the very year of that decision, 1973, that the first child pornography ring—involving some fourteen adults using boys under age thirteen for sex and production of pornographic materials—was brought to public view.[210] In the four years that followed police and reporters uncovered a wide range of activities involving the sexual exploitation of

children, much of it involving child pornography.[399] Early in 1976 two employees of a large Los Angeles corporation publishing sexually explicit magazines were convicted of pandering for hiring a fourteen-year-old girl to engage in numerous acts of photographed sexual intercourse for publication in the company's magazines.[400] Later in that year the Los Angeles Police Department established a special Sexually Exploited Child Unit to combat child pornography and prostitution,[401] and in the spring of 1977 a string of investigative articles in the *Chicago Tribune*, *Time* and other major publications helped prompt a full Congressional investigation of the problem.[402]

What Congress discovered in its hearings—which involved one Senate and two House subcommittees over ten dates and four cities from May to September of 1977[403]—was summarized by the Senate Judiciary Committee in its report:

> Child pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale. . . .[404]

According to evidence at the hearings, those industries were producing some 264 different commercial magazines each month showing children nude or engaged in sexual conduct,[405] and the founder of the Los Angeles Sexually Exploited Child Unit reported that "We have 30,000 sexually exploited children in that city."[406] One producer and distributor was reported to have made five to seven million dollars in his own child-pornography business,[407] while other witnesses before Congress described the kidnapping of small children by pornographers,[408] and even their sale by parents.[409]

Child pornography had, in short, become a part of the commercial mainstream of por-

nography by 1977, sold "over the counter" and in considerable quantities. While a substantial amount of such material was of foreign origin,[410] much of it was made using American children. This wholly unanticipated by-product of the "pornography boom" prompted an angry legislative response from Congress and nearly all state legislatures—a response that in itself seems to have reshaped completely the nature of the child-pornography industry.

The governmental battle against sexual exploitation of children has been an ongoing, evolutionary one, marked by an extraordinary degree of consensus among legislators on both the federal and state levels. Detailed analysis of the wide array of statutes which have resulted from this shared concern is beyond the scope of this report. Nevertheless, a general review of applicable federal statutes, along with attention to significant features of current states, is a crucial backdrop to the Commission's recommendations, and, more importantly to understanding the substantial changes in the child-pornography industry since 1977.

Federal Statutes. Comparison of the two major Congressional acts designed to fight sexual exploitation, approved six years apart, provides perhaps the best evidence of how a changing child pornography industry has taxed legislative ingenuity:[411]

1. *The Protection of Children from Sexual Exploitation Act of 1977 (the "1977 Act").*[412] The immediate response of Congress to the evidence gathered in its 1977 investagations was this law, approved February 6, 1978.

It categorically prohibited the production of any "sexually explicit" material using a child under age sixteen, if such material is destined for, or has already travelled in interstate commerce.[413] The definition of the phrase "sexually explicit" included any

conduct involving sexual intercourse of any variety, bestiality, masturbation, sado-masochistic abuse, or "lewd exhibition of the genitals or pubic area."[414] Stern penalties (10 years imprisonment and/or $10,000 fine) were imposed for violating these provisions,[415] and were made applicable, as well, to parents or other custodians who knowingly permit a child to participate in such production.[416]

With regard to the traffic in child pornography already produced, the 1977 Act took a somewhat different approach. With the evidence gathered at the hearings centering overwhelmingly on the *commercial* character of such traffic, Congress understandably directed its prohibitions against the transportation, shipping, mailing, or receipt of child pornography in interstate commerce "*for the purpose of sale* or distribution *for sale*."[417] Thus bartering or simply giving away child pornography was not prohibited even if conducted through the mail. Further, constitutional concerns led Congress to restrict the application of these provisions to material depicting children engaged in "sexually explicit" activity, which was also "obscene" under the *Miller* test.[418] As under the production provisions, the age limit for children protected was set at sixteen, and the penalties imposed were identical.[419]

2. *The Child Protection Act of 1984* (the "*1984 Act*").[420] Strong as it appeared to be on its face, the 1977 Act was soon found by federal law enforcement officials to be of only limited practical value. The production of child pornography is so clandestine in character that from 1978 to 1984 only one person had been convicted under that portion of the 1977 Act.[421] As for distribution of the material, the traffic in child pornography went underground after 1978, and commercial magazines such as those shown to Congress

in 1977 were no longer available "over-the-counter" in pornography outlets. Rather, as a Postal official told Congress in 1982, the "bulk of child pornography traffic is noncommercial."[422] This meant, as a Federal Bureau of Investigation witness told the same hearing, that federal enforcement of the 1977 Act was "seriously impaired" by its "for sale" requirements.[423] Further, the limitation of the trafficking provision of the 1977 Act to "obscene" child pornography placed substantial obstacles in the path of prosecutors.[424]

Confronted by this evidence, and reinforced by the Ferber decision removing any doubt about the necessity of "obscenity" limitations, Congress in May, 1984, approved a broad revision of the 1977 Act. The Child Protection Act of 1984 removed the requirement that interstate trafficking, receipt, or mailing of child pornography be for the purpose of "sale" to be criminal.[425] Further, it wholly eliminated the "obscenity" restrictions of the 1977 Act,[426] and raised the age limit of protection to eighteen.[427] Provisions raising the amount of potential fines were included,[428] along with new sections authorizing criminal and civil forfeiture actions against violators.[429] The definition of "sexually explicit" material was adjusted slightly: the first word in "lewd exhibition of the genitals or pubic area" was changed to "lascivious," and "sadistic or masochistic abuse" was substituted for "sado-masochistic abuse."[430] Written materials, finally, were clearly excluded from the law's reach in this area: only "visual depictions" of children are criminally actionable.[431]

The result of these revisions was a dramatic increase in federal prosecutions. In the first nine months after passage of the 1984 Act virtually the same number of people were indicted for federal child pornography offenses as had been indicted during the previous six years.[432] The production provisions, however,

continued to produce few indictments, in part because of the extraordinary difficulties of investigation and proof, and in part, perhaps, because the more easily used trafficking provisions often may be invoked against suspected producers instead. It appears, in any case, that the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry.

State Laws. The federal interest in protecting children, of course, is secondary to that of the states, which act as principal guardians against the abuse or neglect of the young. It was indeed a *state* law substantially broader than the 1977 Act which prompted the landmark decision in *New York v. Ferber*.[433] States are not limited, as is the federal government, to regulation of child pornography in or affecting interstate commerce; they have the power to prohibit *all* production and trafficking in such materials.

To a substantial extent the states have exercised that power. Nearly all ban the production of child pornography, and an overwhelming majority prohibit distribution as well.[434] Most prohibit as well parental consent or accession to use of children in sexually explicit materials, and many outlaw facilitation of sexual exploitation through financing, developing, duplication, or promoting child pornography.[435] Some have prohibited as well the *possession* of child pornography, an extremely effective weapon against child molesters.[436]

Yet it is clear, too, that much remains to be accomplished on the state level. Not all states ban trafficking in child pornography, so that it remains possible in some parts of this country to distribute such materials intrastate without fear of criminal penalty. Further, only

about half of the states protect children from use in pornography until their eighteenth birthday; in other states the age limit is set at sixteen or seventeen.[437] (This Commission has determined, indeed, that such protections should, on a somewhat more limited basis, be extended to age twenty-one.)[438] Finally, few states appear to have taken action to provide substantial assistance to *victims* of child pornography—either through direct aid or through encouraging private civil remedies.[439] The primary role of states in caring for children would seem to argue for their assumption of the principal share of the burden of providing such assistance.

The legislative assault on child pornography drastically curtailed its public presence; it has not, however, ended the problem. Sexual exploitation of children has retreated to the shadows, but no evidence before the Commission suggests that children are any less at risk than before. The characteristics of both perpetrators and victims, combined with the extremely limited state of professional understanding, make it unlikely that child pornography is a passing phenomenon.

Those who sexually exploit children do so for a wide range of reasons, and come from an extremely broad array of backgrounds, and occupations,[440] but it seems helpful to group them into two categories: "situational" and "preferential" molesters.[441] The former are people who act out of some serious sexual or psychological, need, but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that

"preferential" child molesters over the long term victimize far more children than do "situational" abusers.

The approaches adopted by various perpetrators also vary widely. The most recent research on "child sex rings" indicates that they range in structure from highly organized, "syndicated" operations involving several perpetrators and many children with production of child pornography for sale or barter, to "solo" operations in which children are abused and photographed by only one perpetrator for his pleasure.[442] Child pornography, while serving primarily the perpetrator's own needs, is also useful for lowering the inhibitions of other children being recruited by the perpetrator.[443] Wholly commercial operations appear to be extremely unusual, but are still not unknown.[444]

The normal absence of commercial motives, and the strong sexual and/or psychological needs which push both situational and preferential molesters toward sexual abuse of children in pornography, suggest that the *demand* for such material may be somewhat inflexible. While situational abusers may be steered away from children as victims, preferential abusers may not—and they are prone, moreover, to far more frequent abuse. However strong the criminal law, sexual exploitation of children seems likely to remain an irresistible temptation for some.

What is worse, the *supply* of potential victims seems inexhaustible as well. Children used in pornography seem to come from every class, religion, and family background; a majority are exploited by someone who knows them by virtue of his or her occupation,[445] or through a neighborhood, community or family relationship. Many are too young to know what has happened; others are powerless to refuse the demand of an authority figure; some seem to engage in the conduct "volun-

tarily," usually in order to obtain desperately needed adult affection.[446] Adolescents used in pornography are often runaways, homeless youth or juvenile prostitutes who may feel with some justice that they have little choice but to participate.[447] Thus it seems clear that a large class of children and teenagers *vulnerable* to use in pornography will continue to exist. Even redoubled efforts to teach children to protect themselves from such involvement will not wholly blunt the strong social, family, and economic forces creating that vulnerability.

The rise of the child pornography "problem" took medical, social services and legal communities as much by surprise as it did Congress and the general public. It is only fair to note, therefore, that what one witness dubbed "conceptual chaos" is a serious obstacle to progress against sexual exploitation of children in pornography;[448] at present only a tiny quantity of serious scholarship on the subject has found its way into print.[449] There are indications, moreover, that researchers and clinicians attempting to specialize in the field have faced serious resistance from their peers.[450]

No profession is more open to the charge of ignorance in this area than the law itself.[451] Court procedures are particularly intimidating for children asked to relate extremely intimate sexual details that they know will be reacted to with horror by family and friends.[452] A criminal proceeding, moreover, creates a double bind for the child: if he is believed, a former "friend" will go to jail; if he is not, he must endure additional guilt from thoughts that perhaps he did not tell enough.[453] The study of novel investigative and courtroom procedures to address these problems is only in its infancy: where the child pornography itself is not sufficient, without use of the victim as a witness, to establish the prosecutor's case, parents are

likely to face an excruciating dilemma. Lawyers and judges, like doctors and mental health professionals, remain largely ignorant of how to respond to child pornography victims.

That ignorance is deeply unfortunate because the pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvement include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety.[434] Victims in the longer term may successfully "integrate" the event, particularly with psychiatric help,[435] but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of the self, and possible entry into delinquency or prostitution.[436] All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control.[437] That may well be their most unhealable wound.

Because the trauma inflicted on children by sexual exploitation is so great, it has seemed to the Commission particularly important to examine every possible approach to improving the state of the law and services to victims. While limitations of time and resources placed significant constraints on that effort, it was nonetheless possible to discuss the problem of child pornography from a number of different perspectives, and to develop recommendations where the evidence called for them. The recommendations so conceived follow, along with explanations of the reasons for each.

TABLE 1

Situational Child Molester

	REGRESSED	MORALLY INDISCRIMINATE	SEXUALLY INDISCRIMINATE	INADEQUATE
BASIC CHARACTERISTIC	Poor Coping Skills	User of People	Sexual Experimentation	Social Misfit
MOTIVATION	Substitution	Why Not?	Boredom	Insecurity and Curiosity
VICTIM CRITERIA	Availability	Vulnerability and Opportunity	New and Different	Non-Threatening
METHOD OF OPERATION	Coercion	Lure, Force, or Manipulation	Involve in Existing Activity	Exploits Size Advantage
PORNOGRAPHY COLLECTION	Possible	Sadomasochistic; Detective Magazines	Highly Likely; Varied Nature	Likely

Source: U.S. Department of Justice, Federal Bureau of Investigation, *CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement*, 19, (1988).

TABLE 2

Preferential Child Molester

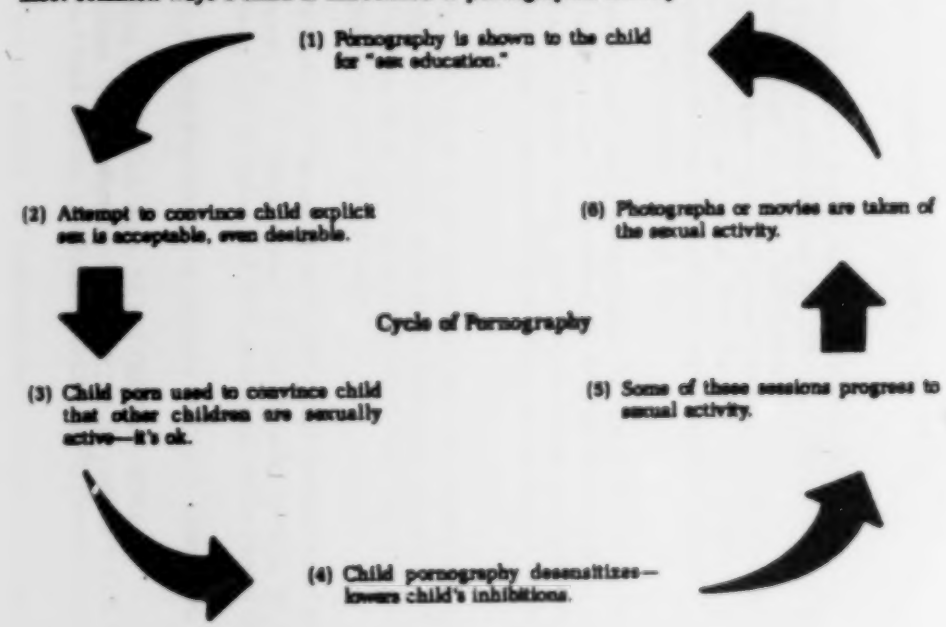
	SEDUCTION	INTROVERTED	SADISTIC
COMMON CHARACTERISTICS	1. Sexual Preference for Children 2. Collect Child Pornography and/or Erotica		
MOTIVATION	Identification	Fear of Communication	Need to Inflict Pain
VICTIM CRITERIA	Age and Gender Preferences	Strangers or Very Young	Age and Gender Preferences
METHOD OF OPERATION	Seduction Process	Non-Verbal Sexual Contact	Lure or Force

Source: U.S. Department of Justice, Federal Bureau of Investigation, *CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement*, 25, (1986).

TABLE 3

Cycle

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:



Source: S. O'Brien, Child Pornography, 80, (1983).

387. *Report of the Commission on Obscenity and Pornography* 7-23 (1970).

388. *Id.*, p. 139.

389. *Id.*, pp. 57-67.

390. See, Photographic vase drawings in K. J. Dover, *Greek Homosexuality* (1978).

391. See, description of P. Aries, *Centuries of Childhood*, pp. 100-102 (1962) (diary of Heroard, physician to Henri IV, who set down graphic details of sexual "play" with the child Louis XIII).

392. 458 U.S. 474, 746 (1982). The Court also required that the "category of 'sexual conduct' proscribed must also be suitable limited and described," *id.*, and must not include mere "nudity." *Id.*, p. 765 n. 18. The New York statutes in question, Penal Law 263.15, was found to fit these requirements even though it included "lewd exhibition of the genitals" in its definition of proscribed sexual conduct. *Id.*, p. 773.

393. The Ferber Court began its analysis of "child pornography" by noting the judgment of legislators and clinicians that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," a judgment the Court found "easily passes muster under the First Amendment." *Id.*, p. 758. Ferber thus rests squarely on the assumption that the materials in question are limited to those in the production of which *actual* children have been used.

394. *Id.*, p. 764.

395. Thus the Court found that "a work which, taken as a whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography." *Compare, id*, pp. 774-775 (O'Connor, J., concurring) (no defense based on "serious value" should be allowed) *with id.*, pp. 775-777 (Brennan, J., concurring in the judgment) (such a defense required by First Amendment).

396. 413 U.S. 15 (1973).

397. For the full discussion of the problem of the use of adult performers in commercial pornography, See, Chapter 17.

398. S. O'Brien, *Child pornography*, p. 60 (1983) (arrests by Los Angeles police). In August of 1973 the sexually sadistic murder of twenty-seven young boys by Dean Corll was uncovered, while several other call-boy rings were also exposed that year.

399. See R. Lloyd, *For Money or Love: Boy Prostitution in America* (1977); C. Linedecker, *Children in Chains* 212-242 (1981).

400. *People v Fixler*, 128 Cal. Rptr. 363, 56 Cal. App. 3d 321 (2d Dist. 1976).

401. *Sexual Exploitation of Children, Hrgs. Before the Subcomm. on the Judiciary, U.S. House, 95th Cong., 1st Sess.* 63 (1977) (statement of Investigator Lloyd Martin, Los Angeles Police Dep't) (hearings hereinafter referred to as "Subcommittee on Crime Hearings").

402. For a reprint of the most influential articles See, Subcommittee on Crime Hearings, *supra* note 401, pp. 422-443.

403. Subcommittee on Crime Hearings, supra note 401; Sexual Exploitation of Children, Hrgs. Before the Subcomm on Select Education, Comm. on Education and Labor, U.S. House, 95th Cong., 1st Sess. (1977) (hereinafter "Select Education Subcommittee Hearings"); (Protection of Children Against Sexual Exploitation, Hrgs. Before the Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary, U.S. Senate, 95th Cong., 1st Sess. (1977) (hereinafter "1977 Senate Hearings").

404. S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

405. Subcommittee on Crime Hearings, supra note 402, p. 43 (testimony of Dr. Judianne Densen-Gerber, Presl, Odyssey Institute).

406. *Id.*, p. 59 (testimony of Lloyd Martin).

407. *Id.*, p. 117 (statement of Michael Sneed, reporter, Chicago Tribune).

408. Select Education Subcommittee Hearings, supra note 403, p. 116. (statement of Robin Lloyd).

409. *Id.*, pp. 42-43 (testimony of Lloyd Martin).

410. For an excellent overview of the production of child pornography in the Netherlands, Denmark and other northern European countries—as well as the repackaging for shipment to the United States of material originally produced in America—see, Child Pornography and Pedophilia, Hrgs. Before the Perm. Subcommittee on Investigations, Comm. on Governmental Affairs, U.S. Senate, 98th Cong., 2d Sess; Part 1 (1984) (especially testimony of Kenneth J. Herrmann, Jr., and Michael Jupp, and Toby Tyler, *id.*, pp. 322-37); and Child Pornography and Pedophilia, Hrg. Before the Perm. Comm. on Investigations, Comm. on Governmental Affairs, U.S. Senate, 99th Cong., 1st Sess., Part 2 (1985) (especially testimony of Elliott Abrams, *et al.*, members of federal interagency group which traveled to Denmark, The Netherlands, and Sweden to discuss problem of child pornography with government officials) (hearing hereinafter referred to as "1985 Hearings").

411. For a more complete discussion and comparison of the relevant federal statutes, see, Loken, The Federal Battle Against Child Sexual Exploitation; Proposals for Reform, Harv. Women's L. J. (1986).

412. P. L. 95-225, 92 Stat. 7 (1978), codified, p. 18 U.S.C.S. SS2251-2253 (1979).

413. 18 U.S.C.S. S2251(a) (1979).

414. 18 U.S.C.S. S2253 (1979).
415. 18 U.S.C.S. S2251(c) (1979).
416. 18 U.S.C.S. S2251(b) (1979).
417. 18 U.S.C.S. S2252 (1979).
418. *Id.*
419. *Id.*
420. P. L. 98-299, 98 Stat. 204 (1984), codified at 18 U.S.C.S SS2251-2255 (1985 Supp.). The constitutionality of this act has recently been sustained by two different federal court. *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).
421. 1985 Hearing, *supra* note 410, p. 104 (statement of Victoria Toensing, Dep'y Asst. Attorney General).
422. *Exploited and Missing Children, Hrg. Before the Subcomm. on Juvenile Justice, Comm. on the Judiciary, 97th Cong., 2nd Sess.* 47 (statement of Charles P. Nelson).
423. *Id.* at 39 (statement of Dana E. Caro).
424. *Child Pornography, Hrg. Before the Subcomm. on Juvenile Justice, Senate Comm. on the Judiciary, 97th Cong., 2nd Sess.* (1982) (statement of Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County).
425. 18 U.S.C.S. S2252(a) (1979).
426. *Id.*
427. 18 U.S.C.S. S2255 (1) (1979).
428. 18 U.S.C.S. SS2251, 2252 (1979).
429. 18 U.S.C.S. SS2253, 2254 (1979).
430. 18 U.S.C.S. S2255 (1979).

441. For these categories and the analysis that follow from them the Commission is grateful to Special Agent, Kenneth Lanning, F.B.I.

442. Belanger, *supra* note 441, p. 51.

443. Lanning, *Collectors*, in *Sex Rings*, *supra* note 440, p. 86.

444. See, *Sex Rings*, *supra* note 440, pp. 67-73, 78 (seventeen of fifty-four child sex rings studies were "syndicated", most of which sold child pornography and used children in prostitution).

445. *id.*, pp. 74-75 (38.2 percent of offenders studied had access to children through occupation; 27.3 percent through their "living situation").

446. U. Schoettle, *Report to the United States' Attorney General's Comm'n on Pornography* 11 (Miami Hearing).

447. See, Rabun, *Combatting Child Pornography and Prostitution: One County's Approach*, in *Child Sex Rings*, *supra* note 441, pp. 187-200 (fifteen percent of runaways acknowledged involvement in pornography. James Scanlon & Price *Youth Prostitution*, in *Child Sex Rings*, p. 139 (seventy-five percent of male hustlers aged fourteen to twenty-five had participated in pornography).

448. Miami Hearing, Vol. I, Roland Summit, p. 210A19.

449. The leading studies seem to be those contained in *Child Sex Rings*, *supra* note 440, and U. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980) (cited by the Court in *New York v. Ferber*, 458 U.S. at 758 n. 9) [hereinafter "Child Exploitation"].

450. Statement of Roland Summit, *supra* note 448, pp. 8-15.

431. 18 U.S.C.S. SS2251, 2252 (1979).

432. 1985 Hearing, *supra* note 410, at 104 (Victoria Toensing). Statistics provided to the Commission by the Department of Justice indicate that 183 of the 255 indictments under federal child pornography laws from 1978 to February 27, 1986, were obtained *after* passage of the 1984 Act on May 21, 1984.

433. The law in question was N.Y. Penal Law S263.15.

434. National Legal Resources Center for Child Advocacy and Protection, A.B.A., *Child Sexual Exploitation: Background and Legal Analysis* 35 (1984) (49 states as of November 1984) (hereinafter "A.B.A. Analysis").

435. *Id.*, p. 36.

436. Thus Special Agent Kenneth Lanning of the F.B.I. noted in his testimony before the Commission that "pedophiliacs" almost always collect child pornography and/or child erotica." Miami Hearing, Vol. I., Kenneth Lanning, p. 232.

437. A.B.A. Anaylsis, *supra* note 434, p. 37.

438. See, The discussion in this Chapter for Recommendations for Federal Legislation, *infra*.

439. As an example of the difficulty of obtaining for children victimized in sexually explicit material see, *Faloona v. Hustler Magazine*, 607 R. Supp. 1341 (D.C. Tex. 1985), *appeal* docketed, No. 85-1359 (5th Cir. 1985).

440. Washington Hearing, Vol. I, Daniel Mihalko, p. 149; Belanger, *et. al.*, *Typology of Sex Rings Exploiting Children*, in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984) (hereinafter "*Sex Rings*").

451. The most scathing indictment of the legal system's capacity to bring child pornography cases to justice was supplied to the Commission by Dr. Roland Summit, who said, in part: "Sex crimes, more than 'legitimate' crimes, seem to require criminal conviction to justify public validation. That standard in itself represents another Catch 22 in favor of traditional denial. The insistence of proof beyond reasonable doubt for an invisible and illogical crime almost guarantees suppression and repudiation." *Id.* pp. 5-6.

452. See *generally*, Summit & Kryso, *Sexual Abuse of Children: A Clinical Perspective*, in *Children and Sex*, pp. 111, 123-124 (L. Constantine & F. Martinson eds. 1981).

453. *Child Exploitation*, *supra* note 449, p. 297.

454. Schoettle Statement, *supra* note 446, p. 10.

455. Burgess, *et al.*, *Impact of Child Pornography and Sex Rings on Child Victims and Their Families* in *Child Sex Rings*, *supra* note 440, pp. 115-117.

456. Schoettle Statement, *supra* note 446, p. 10.

457. See *New York v. Ferber*, *supra* note 392, 458 U.S., p. 759, and studies cited therein.

APPENDIX C

RECOMMENDATIONS FOR STATE LEGISLATION

RECOMMENDATION 45:
State legislatures should amend laws, where necessary, to make the knowing possession of child pornography, a felony.

Discussion

The United States Supreme Court has called child pornography "a serious national problem."[524] In *New York v.Ferber*, the Court said that child pornography constitutes a permanent record of the children's participation in sexual activity, and the circulation of the pornography exacerbates the harm to the children. If the sexual abuse of children in pornography is to be curtailed the production and distribution network must be eliminated.[525]

Investigators have identified several uses of child pornography. The first use by pedophiles is for sexual arousal and gratification.[526] While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.

Child pornography is often used as part of a method of seducing child victims.[527] A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by view-

ing other children having "fun" participating in the activity.[328] From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.[329]

A pedophile offender will use child pornography in which the children appear to be having a good time.[330] The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.

Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage.[331] In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.

Pornographic depictions of a child may be used to blackmail the child.[332] The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.

Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors.[333] This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[334] Child pornography which may have originated as a homemade item may eventually by sold to a commercial child pornography publication.[335]

Child pornography has a life of its own. It is a permanent record of the victimization and sexual abuse of the child.[336] The depictions are timeless and may be distributed and circulated throughout the world for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again.[337]

The harms to children from child pornography which the Supreme Court outlined in *New York v. Ferber* occur as a result of the existence of the material itself.[338] The enactment of criminal penalties for the possession of child pornography is essential if these harms are to be effectively curtailed.

Several states have recently recognized the inherent harm in child pornography and have enacted legislation prohibiting the possession of such material.[339] Only recently has this type of legislation met any constitutional challenge.[340] This challenge has been premised on the Supreme Court's ruling in *Stanley v. Georgia*.[341]

In *Stanley*, police executed a search warrant on the defendant's residence seeking evidence of a suspected bookmaking operation.[342] They located three reels of eight millimeter film in a desk drawer and upon viewing the films, they charged the defendant with possession of obscene matter.[343] He was convicted before a jury.[344] The Supreme Court reversed the conviction and held that "the mere private possession of obscene matter cannot constitutionally be made a crime."[345]

The first constitutional challenge to a state statute prohibiting the possession of child pornography came on December 1, 1985. The first appellate district in Ohio found the state law prohibiting possession of child pornography[346] to be unconstitutional.[347] The analysis used in invalidating the statute was based upon the rationale of *Stanley v. Georgia*.[348] The Ohio statute was declared unconstitutional because the state could not punish the mere private possession of magazines "which depicted minors . . . engaging in sexual activ-

ity."[549] *New York v. Ferber*[550] was distinguished on the grounds that it dealt with distribution and not mere possession of child pornography.[551] In finding the statute unconstitutional the Ohio court placed great significance on the language in *Stanley* where the Supreme Court rejected the contention by the state of Georgia that to eliminate the traffic in obscenity, it is necessary to bar mere private possession by an individual.[552]

In *United States v. Miller*,[553] the United States Court of Appeals for the Eleventh Circuit recently upheld the conviction of a defendant who received child pornography from Europe through the mail.[554] The defendant contended that 18 U.S.C. S2252 (a)(a) violated [555] his right to privacy and relied on *Stanley* for his claim that the statute was unconstitutional.[556] The court rejected the defendant's argument that the statute only applies to individuals who intend to distribute child pornography.[557] However, in considering the privacy issue, the court said "prior decisions on the issue of the right to possess obscene materials are controlling in our analysis of this case."[558]

The court relied on several obscenity decisions in which the Supreme Court rejected the argument that *Stanley* created a right to import or receive obscene materials for private use.[559] The court concluded that *Stanley* cannot be expanded to create a right to receive child pornography through the mail.[560]

Any reliance on the rationale of *Stanley* or other obscenity cases with respect to a prohibition against the possession of child pornography is misplaced. *Stanley* upheld an individual's right to privately possess ob-

scene material.[561] The prevailing obscenity standard at the time of the *Stanley* decision was contained in *Roth v. United States*.[562] *Roth* has since been modified in most jurisdictions by *Miller v. California*.[563]

In *New York v. Ferber*,[564] the Supreme Court upheld a New York law prohibiting the promotion of sexually explicit depictions of children that were not obscene under *Miller*.[565] In *Ferber*, the Court reasoned that the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the state's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. The question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have sexually exploited a child through its production. In addition, a work which, taken as a whole, contains serious literary, artistic, political or scientific value may nevertheless embody the most grevious form of child pornography. The Supreme Court reasoned in *Ferber*, "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value. Memorandum of Assemblyman Lasher in Support of S263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem."[566]

Any analysis concerning the constitutionality of laws prohibiting the possession of

child pornography should not be made as a parallel to obscenity statutes. The Supreme Court has clearly distinguished the standards to be applied to child pornography laws and adult obscenity statutes.[567]

The Supreme Court stated in *Ferber* that "the nature of the harm to be combatted requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age."[568] The Court went on to clarify its statement by noting that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[569]

The obscenity precedent is clearly inapplicable to a challenge against a statute in which the offense described clearly involved visual depictions of children engaged in sexual activities.[570]

The rationale underlying the Supreme Court's ruling in *Stanley* is vastly different from that in *Ferber*. In *Stanley*, the Court upheld the defendant's right to "read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home . . . free from state inquiry into the contents of his library."[571] The Court also found, at that time, "little empirical basis" for the assertion made by the state of Georgia that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."[572] However, the Court added in a footnote:

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are

involved in most statutes making mere possession criminal.

> *Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.* See, e.g., 18 U.S.C. S793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . ." In such cases, *compelling reasons may exist for overriding the right of the individual to possess those materials.*[573]

While Ferber admittedly dealt with a statute prohibiting the distribution of child pornography, the decision recognized compelling reasons for overriding the right of an individual to possess child pornography.[574] The Court found that "it is evidence beyond the need for elaboration that a state's interest in safeguarding the physical and psychological well-being of a minor is 'compelling.'"[575] While the Court in *Stanley* found little evidence then existing that exposure to obscene materials may lead to deviant sexual behavior or crimes of violence,[576] the Court clearly states in Ferber that "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[577] Child pornography constitutes a permanent record of the sexual abuse of the child and the harm to the child is exacerbated by the circulation of the material.[578] The very existence of child pornography harms the children who are depicted. According to one child psychiatrist quoted in Ferber, "the victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child."[579] With respect to obscene materials in *Stanley*, the Court found the privacy rights of the individual to be the overriding

concern. In Ferber, however, the Court clearly found the harm suffered by minors to be of paramount importance. The focus of the protection constitutes a major distinction between these two landmark decisions. The Ferber Court's concern for minors included the consideration that when child pornography is produced and distributed, the *child's* privacy interests are violated.[580]

The Court in *Stanley* rejected the argument that prohibition of the possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution.[581] In *Ferber*, the Court recognized that it may be difficult, if not impossible, to stop the sexual exploitation of children by pursuing only those who produce child pornography.[582] Citing the clandestine nature of the child pornography trade, the Court noted that "the only practical method of law enforcement may be to dry up the market for this material . . ."[583] The prohibition of the mere possession of child pornography is a necessary incident to "drying up the market" for a product the Supreme Court has found to be extremely harmful to the youth of the nation. Such laws are also entirely consistent with the objectives sought to be attained by the Court in *Ferber* and should not be confused with other considerations relevant in the obscenity law context.

524. *New York v. Ferber*, 458. U.S., (1982), pp. 747, 749.
525. *Id.*, pp. 759–60.
526. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, (A. Wolbert Burgess ed. 1984), p. 86.
527. *Id.*
528. U.S. Department of Justice, Federal Bureau of Investigation, *Child Molesting: A Behavioral Analysis for Law Enforcement*, (1986), p. 61.
529. *Id.*
530. *Id.*
531. Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. Miami Hearing, Vol. I, R.P. "Toby" Tyler, p. 178A4.
532. Miami Hearing, Vol. II, Paul Der Ohannesian II, p. 51; *See also*, K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, (A. Wolbert Burgess ed. 1984), p. 86.
533. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, A. Wolbert Burgess ed. 1984), p. 86.
534. *Id.*
535. *Id.*

536. Miami Hearing, Vol. I, William Dworin, p. 30.
537. Washington, D.C., Vol. II, John, pp. 47–48.
538. 458 U.S., (1982), p. 747.
539. See, e.g., "Sexual exploitation of a minor; classification A. A person commits sexual exploitation of a minor by knowingly:

1. Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.

2. Distributing, transporting, exhibiting, receiving, selling, purchasing, possessing or exchanging any visual or print medium in which minors are engaged in sexual conduct.

B. Sexual exploitation of a minor is a class 2 felony." Ariz. Rev. Stat. Ann. S13-3553(1984);

"A person who has in possession a photographic representation of sexual conduct which involves a minor, knowing or with reasons to know its content and character and that an actor or photographic subject in it, is guilty of a gross misdemeanor." Minn. Stat. S617.247(1984);

"A person who knowingly and willfully has in his possession any film, photograph or other visual presentation depicting minors engaging in or simulating, or assisting others to engage in or simulate sexual conduct is guilty of a misdemeanor." Nev. Rev. Stat. S200.730(1984);

"A. No person, with knowledge of the character of the material or performance involved, shall do any of the following:

5. Possess or control any obscene material, that has a minor as one of its participants. With purpose to violate division (A)(2) or (4) of this section." Ohio Rev. Code Ann. S2907.321(1984).

540. *Ohio v. Meadows*, No. 84 CRB 25585, Slip op. (1st Dist. Dec. 18, 1985) *cert. granted* (Ohio Apr. 9, 1986) (No. 86-233).
541. 394 U.S., (1969), p. 557.
542. *Id.* p. 558.
543. *Id.*
544. *Id.* pp. 558-59.
545. *Id.* p. 559.
546. R.C. 2907.321(a)(5) (1985).
547. *Ohio v. Meadows*, No. 84 CRB 25585, Slip op. (1st Dist. Dec. 18, 1985), *cert. granted*, (Ohio Apr. 9, 1986) (No. 86-233).
548. 395 U.S., (1969), p. 557.

549. *Ohio v. Meadows*, No. 84 CRB 25585, Slip. op. (1st Dist. Dec. 18, 1985); *cert. granted*, (Ohio Apr. 9, 1986) No. 86-233).
550. 458 U.S. 747(1982).
551. *Ohio v. Meadows*, No. 84 CRB 25585, Slip. op. at 9 (1st Dist., Dec. 18, 1985); *cert. granted* (Ohio Apr. 9, 1986) (No. 86-233).
552. *Id.* at 7.
553. 776 F.2d 978 (11th Cir 1985), *cert. denied*. 54 U.S. L.W. 3698 (U.S. Apr. 22, 1986) (No. 85-1177).
554. *Id.*
555. This provision of the Child Protection Act provides penalties for any person who "knowingly receives or distributes any visual depiction . . ."

556. 778 F.2d, p. 980.
557. *Id.*, p. 979.
558. *Id.*, p. 980 n. 4.
559. *Id.* The court of appeals relied on *United States v. Reidel*, 402 U.S. 35191971); *United v. 12 200 Ft. Reels*, 413 U.S. 123(1973); *United States v. 37 Photographs*, 402 U.S. 363(1971); *United States v. Orito*, 413 U.S. 139(1973).
560. *Id.*, p. 981.
561. 394 U.S. p. 559.
562. 354 U.S., (1957), p. 476.
563. 413 U.S., (1973), p. 15.
564. 458 U.S., (1982), p. 747.
565. *Id.*, pp. 760–61.
566. *Id.*, p. 761.
567. 458 U.S., (1982), p. 747.
568. *Id.*, p. 764.
569. *Id.*, pp. 764–65.
570. *Ohio v. Meadows*, supra note 540, p. 24; 18 U.S.C. S2252(a)(2).
571. 394 U.S., p. 565.
572. *Id.*, p. 566. This Commission has found evidence of harm from exposure to pornography based upon evidence produced since the *Stanley* decision. See, Textual discussion of harms in Chapter 5.
573. *Id.*, p. 568, n. 11.
574. *Id.*, p. 568.
575. *Id.*, p. 756–57.
576. 394 U.S., p. 566.
577. 458 U.S., p. 758.
578. *Id.*, p. 759.
579. *Id.*, p. 759, n. 10.
580. *Id.*, p. 758, n. 9.
581. 394 U.S., p. 567.
582. 458 U.S., p. 760.
583. *Id.*

Supreme Court, U.S.
FILED
SEP 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5986

In The

Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Writ Of Certiorari To
The Supreme Court Of Ohio

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF THE APPELLEE.

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

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INTEREST OF AMICUS CURIAE

Consent

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of Appellant, Osborne, was received from his attorney, Ms. S. Adele Shank, Esq., and of Appellee, State of Ohio, from its attorney, Mr. Ronald J. O'Brien, Esq. A copy of these letters of consent have been filed with the Clerk of the Supreme Court.

American Family Association's Interest

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name of National Federation for Decency,

Inc. AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, AFA has members in all 50 states; over 520 chapters of local citizens who are active in efforts to protect children from pornography and sexual exploitation; and over 370,000 subscribers to its monthly newsletter, AFA Journal. Amicus also offers professional assistance to legislatures and law enforcement officers who wish to address the problems of child sexual exploitation through child pornography.

The ability of a state to protect the welfare of all its citizens, including the children, is vital to the efforts of the AFA membership. American

Family Association, Inc., seeks to promote a healthful environment for all Americans and it recognizes the need to afford children the maximum protection from sexual exploitation. The position of the American Family Association, Inc., will support the interest of the State of Ohio to uphold the authority to proscribe the possession of child pornography.

SUMMARY OF ARGUMENT

I. POSSESSION OF CHILD PORNOGRAPHY IS DIRECTLY RELATED TO THE SEXUAL ABUSE OF OTHER CHILDREN AND THE CONTINUED HARM TO THE CHILD DEPICTED

Child Pornography is the permanent record of the sexual abuse of a child. It serves to entice other children into acts of sexual abuse and is used to silence children who were victimized by the acts.

The existence of child pornography compounds the victimization associated with sexual abuse. It creates additional anxieties in a child and leaves a legacy that is difficult, if not impossible, for children to overcome.

II. THE PROHIBITION AGAINST POSSESSION OF CHILD PORNOGRAPHY ENACTED BY THE STATE OF OHIO DOES NOT VIOLATE THE PRIVACY RIGHT RECOGNIZED IN STANLEY V GEORGIA

The privacy interests involved in Stanley are not comparable to those involved in the present case. The Court must balance the privacy interests of the child involved in the depiction with those of the individual who possesses the material.

Clearly, the State has a compelling interest in safeguarding its children from further harm through the existence

of the depictions. The prohibition against the possession of child pornography is a reasonable response to the problem of sexual exploitation of children through child pornography.

LAW AND ARGUMENT

I. THE POSSESSION OF CHILD PORNOGRAPHY IS DIRECTLY RELATED TO THE SEXUAL ABUSE OF OTHER CHILDREN AND THE CONTINUED HARM TO THE CHILD DEPICTED

A. Possession of Child Pornography is an Integral Link in the Cycle of Sexual Abuse of Children

The sexual exploitation of children through the use of child pornography has been identified as a series of exploitations with a common thread. These segments of exploitation include the production of the visual depiction, the circulation of the visual depiction, the use of the visual depiction to hold captive the victim, and the use of the

visual depiction to seduce and instruct other victims.

Initially, the child who is photographed or filmed is molested. "There is only one way to make child pornography, and that is, you must sexually molest a child. It is a photograph, a slide, a picture of a crime in progress. There is no debate about it." K.V. Lanning, Child Molesters: A Behavioral Analysis 35 (2d ed. 1987 National Center for Missing & Exploited Children). Child pornography is nothing more than the permanent record of the victimization and sexual abuse of the child. Final Report of the Attorney General's Commission on Pornography 650 (1986) [hereinafter cited as Final Report]. Therefore, in order to create the visual depiction the child must be

sexually exploited. Child pornography simply memorialized the abuse and perpetuates the trauma of the abuse. New York v Ferber, 458 U.S. 747, 759 (1982).

Second, experts have identified the child's peculiar cognizance of the permanence of the photograph and film and the circulation of such photographs compounds the victimization the child has suffered. 458 U.S. at 759. Consequently, the mere existence of the depictions is a continuation of the abuse of the child.

Third, the visual depiction of a child is used to blackmail the child and buy his or her continued silence about the sexual abuse. K. Lanning, Collectors, in Child Pornography and Sex Rings 86 (A. Wolbert Burgess ed. 1984). The depictions are held as threats to

insure the child's cooperation and compliance in future exploitation.

Finally, the depictions are used to seduce and instruct other victims. "A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." Collectors at 86. This use of child pornography may have the most directly harmful impact on the greatest number of children. Child pornography becomes an instrument for the abuse and exploitation of other children. Several cases involving the sexual abuse of children have identified the use of

child pornography in the abuse process. [1]

1/ See, e.g., In re R.G., 518 N.E.2d 691 (Ill. App. 1988) ("When R.G. saw a movie with his mother in which a boy was licking a dog's penis and playing with the dog, R.G. stated he did not believe that could happen, and his mother sat their dog on the bed and told R.G. to take down his pants and the dog would lick his penis." 518 N.E.2d at 694); Moberg v State, 770 S.W.2d 930 (Tex. App. 1989) (upon search after arrest for aggravated sexual assault the officers discovered "Moberg's ice chest, clothes, and clothes basket, which contained the polaroid photographs depicting female children performing acts of sex on the private parts of an unidentified male." 770 S.W.2d at 933); Zimmerman v State, 552 A.2d 47 (Md. App. 1989) ("Execution of the warrant revealed photographs of men and boys in various poses displaying their genitalia. The photographs were shown to Zimmerman's ex-wife, who readily identified two of the boys in the pictures as her nephews. The nephews were contacted and, because of what both they and Zimmerman's ex-wife recounted, Zimmerman was arrested and charged with the sexual offenses of which he was convicted." 552 A.2d at 48-49.)

The harm to children used during the creation of child pornography is obvious and substantial. These harms include the risk of physical injury due to abuse of immature organs, infectious disease, and an identifiable probability that the abused child will repeat the cycle of abuse as an adult. 2/

At each stage of the cycle, possession of child pornography is an integral part of the sexual exploitation of the child. In upholding the New York state statute regulating child pornography, this Court in Ferber recognized the harm of the visual depictions. 458 U.S. at 758.

2/ See, Final Report at 626.

B. The State of Ohio Has a Legitimate Governmental Interest in Prohibiting the Possession of Child Pornography

Based upon the recognized harm to the "psychological, emotional, and mental health of the child" the State of Ohio has enacted legislation which is designed to protect children from such harm. It is well settled that the State may prevent the exploitation of children in various forms or activities. The protection from sexual exploitation is an interest that is no less significant.

The Ohio Supreme Court previously addressed the State's interests in enacting the prohibition against possessing child pornography and found that "Ohio's General Assembly has determined that it is necessary to prohibit possession of such materials in order to halt sexual exploitation of

children." State v Meadows, 28 Ohio St. 3d 43, 51, 503 N.E.2d 697, 704 (1986), cert. denied, 480 U.S. 936 (1987). In upholding the prohibition the court stated that "Ohio's compelling state interests of preserving its children's privacy and protecting them from the cruel psychological, mental, and emotional abuse caused by sexual seduction, exploitation, and mistreatment occasioned by child pornography, outweigh appellee's interest in possessing such visual depictions." 28 Ohio St. 3d at 52.

The Ohio Supreme Court in the present case, State v Young, 37 Ohio St. 3d 249, 256-57, 525 N.E.2d 1363, 1372 (1988), stated:

> The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not

> protected by the First Amendment. * * *. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

A State may protect its children through the regulation of a variety of activities including purchase of alcoholic beverages, [3] maximum work day hours, [4] participation in sexually

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3/ See, R.C. §§4301.63 and 4301.632 (Page's Supp. 1988).

4/ See, United States v Darby, 312 U.S. 100 (1941).

explicit performances, [5] and exposure to sexually explicit material. [6]

These laws are all designed to protect children from some identifiable harm. So too, is the prohibition against possession of child pornography. The harms associated with the possession are no less real to the children who have been or may be victimized by its existence. Neither are the harms less severe because the abuse has been captured on film for posterity.

Recently, this Court addressed the Congressional attempt to protect children from exposure to sexually explicit

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5/ See, New York v Ferber, 458 U.S. 747 (1982).

6/ See, Ginsberg v New York, 390 U.S. 629 (1968).

telephone messages. In Sable Communications of California v Federal Communications Commission, 109 S.Ct. 2829 (1989), this Court concluded that the government had a legitimate interest in protecting children from non-obscene material. "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." 109 S.Ct. at 2836.

Protection for children from sexually explicit messages is a legitimate and compelling governmental interest. In the same manner protecting children from the perpetual and repeated victimization occasioned by the existence

and possession of child pornography is equally compelling.

Finally, the intrusion into the individual's home is warranted by the nature of the child pornography distribution system. Child pornography generally originates in the home and may remain in that home or it may be transferred to the home of another individual. In any event, the nature of the distribution system does not generally involve the public marketplace. Consequently, the activities of the child pornography distributors have, in essence, turned their private homes into marketplaces for purposes of child pornography dissemination. Therefore, the prohibition of the possession of child pornography which may seem overly-intrusive in the context of a general

marketplace distribution scheme is not so because of the clandestine nature of child pornography trafficking.

II. THE PROHIBITION AGAINST POSSESSION OF CHILD PORNOGRAPHY ENACTED BY THE STATE OF OHIO DOES NOT VIOLATE THE PRIVACY RIGHT RECOGNIZED IN STANLEY V GEORGIA

A. The Nature of Child Pornography Supports Such a Prohibition

The Court in Stanley v Georgia, 394 U.S. 557, 568 (1969), held "that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." In reaching this conclusion the Court discussed the assertion that exposure to obscene materials may lead to deviant sexual behavior. The Court found that such allegations were not adequately supported. In addition, the Court found that assertions that the prohibition

against private possession was not justified on the basis that such action was necessary to address the problem of distribution.

The very nature of child pornography creates a need to reach a different conclusion using the rationale of the Stanley Court. First, as noted earlier, there is significant evidence that exposure to child pornography leads to anti-social or deviant behavior. By virtue of the fact that those who choose to view child pornography are, in essence, participating in the victimization of the child.

Private possession of child pornography comes about in one of two ways: it was created by the possessor; or it was disseminated to the possessor by the creator or third party. If the

possessor is the creator of the depiction then he was an active and physical participant in the sexual abuse of the child. If the possessor obtained the depictions from some other person, then he is participating in the perpetuation of the abuse of the child depicted. In either case, private possession is not an isolated activity. The nature of child pornography is such that the visual depiction which resulted from the abuse serves as a continual source of abuse to the victim.

Second, the Stanley Court found no evidence that would justify prohibition of private possession as a means of attacking the distribution of obscene material. The nature of child pornography and its distribution network are such that this action on the part of

the State of Ohio is reasonable. Unlike obscene material, child pornography is traded and sold in a clandestine manner. The covert nature of child pornography presents unique challenges for a State wishing to afford its children full protection from the harms of such material.

There have been significant attributes identified with respect to the acquisition and collection of child pornography. 7/ In addition, there is

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7/ "The pornographic materials themselves provide a method of recording and remembering the children, a stimulus to sexual arousal, an instructive guide for new children, an item of exchange and a focus of communication among other collectors, and a source of revenue. In addition, there are strong indications that the pictures allow the collector a connection with earlier traumatic experiences when he himself was

(Footnote Continued)

significant evidence that individuals who are consumers of child pornography collect such depictions and continually seek to expand this collection. 8/

(Footnote Continued)
victimized. Rather than confronting the victimization, the collector preserves psychological integrity by producing pornographic material that attempts to justify and normalize the abuse while safeguarding aggressive and libidinal drives. The pornography becomes the confirming evidence against the argument that child exploitation and molestation is not harmful and is justified because the child has aggressive and sexual drives. Pornography endorses the belief patterns that ultimately justify violence toward children. First, there is the precarious belief of the child victim that pornography and exploitation are wrong. This changes to a belief that it is acceptable and that the child is responsible for the sexual activity." C. Hartman, A.W. Burgess and K.V. Lanning, Typology of Collectors, in Child Pornography and Sex Rings 107-08 (A. Wolbert ed. 1984).

8/ See, K. Lanning, Collectors, in Child Pornography and Sex Rings 84-86 (A. Wolbert Burgess ed. 1984). Mr. Lanning
(Footnote Continued)

Finally, as the Court in Ferber noted, "[t]he value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis." 458 U.S. at 762. Of the established uses of child pornography none is, to any degree, beneficial to society.

B. The Nature of the Privacy Interests Involved in the Possession of Child Pornography

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(Footnote Continued)
identifies several reasons why pedophiles maintain the child pornography collection. This includes the need to "satisfy, deal with, or reinforce compulsive, persistent sexual fantasies about children"; "understand and justify their behavior"; have "camaraderie and additional behavior validation"; and keep the child at a constant age because "no matter how attractive any one child sexual partner is, there can be no long-term sexual relationship. All child victims will grow up and become sexually unattractive to the pedophile."

There are two primary interests involved in the private possession of child pornography: those of the possessor and those of the child depicted. In Stanley, the Court discussed the privacy interests of an individual to possess obscene material. The Court stated, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565.

The Court's conclusion in Stanley is inapplicable to the prohibition against the private possession of child pornography for two primary reasons. First, as discussed above, the nature of

child pornography presents evils that were unsubstantiated with respect to the possession of obscene material. In United States v Andersson, 803 F.2d 903, 907 n.3 (7th Cir. 1986), the court noted:

> It is not clear to this Court that Andersson possesses such a right. Stanley held that the state may not proscribe possession of obscenity in the privacy of the home. According to Stanley, the State's interest in regulating obscenity (generally protecting the unwilling viewer and public morals), ended at the door of the private home. But the State's interests in regulating child pornography are radically different than those in regulating obscenity. The State's primary concern is protecting the child participants from that type of sexual abuse. The harm inflicted on these children is two-fold. First is the sexual abuse when the film or photograph is initially produced but that harm continues when these photographs and films are distributed. Ferber, 458 U.S. at 759, 102 S.Ct. at 3355; Shouvlin, Preventing the Sexual

> Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981) ("A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.") Drying up the market may be the only way to effectively combat the production. Ferber, 458 U.S. at 760, 102 S.Ct. at 3356. Therefore, the State's interests in regulating pedophilic pornography may well extend into the private home.

Therefore, the underlying analysis used by the Court in Stanley is fallacious in the present situation.

Second, the rationale supporting the State's prohibition against possession of child pornography is not associated with an attempt to control a person's mind. The interests supporting the State's actions are solely related to the need to protect its children from harms associated with the existence of child pornography. Individuals may think and

fantasize about sexual activity with children, the State has merely prohibited the further exploitation of actual children for such purposes.

The second privacy interest involved is that of the child in the depiction. Each depiction represents the sexual abuse of a child. When the abuser retains the photograph or when the depiction is held by someone else the privacy interests of the child are significantly affected.

It is the attempt to protect the children who have been exploited by the sexual abuse from further exploitation through the consumption of child pornography. So long as the depictions of the abuse are in existence, the child depicted suffers additional anxiety and harm. To effectively safeguard the

child's interests the State's action in prohibiting the possession of such depictions is a reasonable and necessary step. 9/

9/ "Although harms to performers involved would not otherwise be taken to be sufficient condition for restriction of the photographs rather than the underlying conduct, the situation with children is of a different order of magnitude. The harm is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. As a result, forms of deterrence of the underlying conduct that might not otherwise be considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts,

(Footnote Continued)

The analysis of the possession statute requires a balancing of the privacy interest of the child, the interests of the State in protecting the child and whatever privacy interests an individual may have in possessing child pornography. It is clear that the interests of the State in protecting children from the harms associated with the existence of child pornography and the child's privacy rights clearly outweigh any privacy interest an individual may have in possessing child pornography.

III. CONCLUSION

(Footnote Continued)
enforcement will be difficult." Final Report at 412-13.

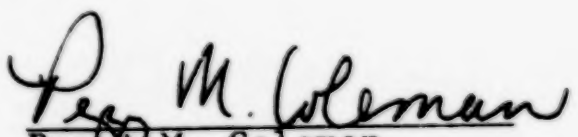
This Court has the opportunity to clearly articulate that a state may regulate the possession of child pornography in an effort to protect its children from the harms associated with such depictions. In doing so, this Court would recognize the well-established harms attributable to the mere existence of child pornography and the compelling interest of the state to protect the welfare of the child.

The Court, in upholding the Ohio Supreme Court decision, would be in keeping with established precedent regarding the privacy interests of the child and possessor. As in any situation involving privacy interests, the Court is called upon to balance these interests. Clearly, the interests of the child

outweigh any interest an individual may have in possessing child pornography.

For these reasons, in addition to those urged by Appellee herein, the decision below should be affirmed.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this eighth day of September, 1989, to the following counsel of record:

Mr. Ronald J. O'Brien
City Attorney
90 West Broad Street
Columbus, Ohio 43215

Ms. S. Adele Shank
Office of the Ohio Public Defender
8 East Long Street
Columbus, Ohio 43266-0587

All parties required to be served have been served.

Peggy M. Coleman
Attorney for Amicus Curiae

Supreme Court, U.S.
FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-5986

In The Supreme Court of the United States

October Term, 1989

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Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF AMICI CURIAE, THE ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, MASSACHUSETTS, MICHIGAN, MISSOURI, NEVADA, OHIO, SOUTH DAKOTA AND WASHINGTON

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

LOREN L. BRAVERMAN
Deputy Chief Counsel
Counsel of Record

ANDREW I. SUTTER
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Counsel for Amici Curiae

Of Counsel:

ROBERT K. CORBIN
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

FRANK J. KELLEY
Attorney General
State of Michigan
Law Building, 7th Floor
525 West Ottawa Street
Lansing, Michigan 48913

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahasse, Florida 32301

WILLIAM L. WEBSTER
Attorney General
State of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

JAMES T. JONES
Attorney General
State of Idaho
Statehouse, Room 210
Boise, Idaho 83720

BRIAN MCKAY
Attorney General
State of Nevada
Heroes Memorial Building
Carson City, Nevada 89710

LINLEY E. PEARSON
Attorney General
State of Indiana
State House, Room 219
200 West Washington Street
Indianapolis, Indiana 46204

ROGER A. TELLINGHAUSEN
Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota
57501

THOMAS J. MILLER
Attorney General
State of Iowa
Department of Justice
Hoover Building
Des Moines, Iowa 50319

KENNETH O. EIKENBERRY
Attorney General
State of Washington
7th Floor, Highway-Licenses
Building
Olympia, Washington 98504

ROBERT T. STEPHAN
Attorney General
State of Kansas
2nd Fl., Judicial Center
Topeka, Kansas 66612-1597

JAMES M. SHANNON
Attorney General
Commonwealth of Massachusetts
John W. McCormack State Office Building
One Ashburton Place, Room 2001
Boston, Massachusetts 02108

QUESTIONS PRESENTED

I. Do the First Amendment to the United States Constitution and *Stanley* v. *Georgia*, 394 U.S. 557 (1969), guarantee to citizens the fundamental right and liberty to privately possess child pornography?

II. May a state prohibit private possession of child pornography consistent with the First Amendment where the material is a visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals?

III. May a State Supreme Court consistent with due process authoritatively construe a statute prohibiting possession of child pornography and affirm a conviction under that construction where the legislative intent of the statutory scheme is clear and the narrowing construction is foreseeable?

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.5 of the Rules of the Supreme Court of the United States, the attorneys general of the states identified above submit this brief as *amici curiae* in support of the position espoused by Appellee. The case at bar presents a challenge to the constitutionality of a portion of a statutory scheme promulgated to further a state's compelling interest in protecting its young people from sexual exploitation and violence. Each of the states represented

by amici have in effect legislation prohibiting the possession[1] of or otherwise regulating child pornography. This Court's decision, therefore, is of great interest to the amici because it will bear on the lawfulness of existing and future legislation in this area of the law.

STATEMENT

1. In 1985, United States postal inspectors began an investigation into a Florida business regarding its use of the mails to transmit child pornography (Jt. App. 3). During the investigation, postal inspectors corresponded with Jack S. Smith, a principal in the Florida business. Smith disclosed in one letter that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend in Columbus, Ohio. Later, federal authorities executed a search warrant on the premises of Smith and Daniel S. Knous and pursuant to the warrant seized thousands of photographs depicting minors engaging in sexual conduct. Smith and Knous were arrested on federal charges (Jt. App. 3-5).

After his arrest, Smith told postal inspectors that photographic negatives depicting child pornography were in the possession of a friend, Clyde Osborne of Columbus, Ohio. The same information was conveyed to postal authorities by Knous. One mailing list seized during the execution of the search warrant contained the name of Clyde Osborne of Columbus, Ohio (Jt. App. 5-6).

The information concerning Osborne was conveyed by the postal authorities to the Columbus police. A warrant to search the premises of the Osborne residence was applied for and received. During the search, Columbus police found

[1] Nineteen states have banned the possession of child pornography. *See*, listing at A-6. In addition to the Supreme Court of Ohio, two other state supreme courts have expressly found that such statutes are constitutional. *Id.*

and seized four color photographs of a nude young male posing in a lewd manner with a graphic focus on his genitals (Jt. App. 8-10, 20-21, 29, 33). The back of one of the photographs was marked with the notation "Tommy-13" (Jt. App. 9, 11, 19). At a police interview after his arrest, Osborne stated that the subject of the photographs was fourteen years of age when the photography was taken (Jt. App. 14).

2. Osborne was charged by criminal complaint in the Franklin County, Ohio, Municipal Court with a violation of Ohio Revised Code Ann. 2907.323(A)(3) (Page's 1987) (hereinafter "Ohio Rev. Code" or "O.R.C.")(A-4), in that he possessed child pornography as described above (Jt. App. 7). A violation of Ohio Rev. Code 2907.323(A)(3) constitutes a first degree misdemeanor. O.R.C. 2907.323(B)(A-5). After pleading not guilty, Osborne received a trial by jury. The jury found Osborne guilty of the offense charged (Jt. App. 23).

3. The Ohio Court of Appeals affirmed Osborne's conviction (Jt. App. 35). On appeal from the Court of Appeals decision, the Supreme Court of Ohio, in a consolidated case reported under the name *Ohio v. Young*, 37 Ohio St. 3d 249, 525 N.E. 2d 1363 (1988), affirmed Osborne's conviction. The Ohio Supreme Court rejected Osborne's constitutional challenges to O.R.C. 2907.323(A)(3). Following its prior holding in *Ohio v. Meadows*, 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986), *cert. denied* 107 S. Ct. 1581 (1987), in which it found that Ohio's compelling interest in protecting children from the dangers arising from the possession of child pornography prohibited in O.R.C. 2907.322 (A-3) overrode any countervailing interest in possessing such materials, the court held that possession of the materials specified in O.R.C. 2907.323(A)(3) could be prohibited consistent with the First Amendment. The court authoritatively construed O.R.C. 2907.323(A)(3) and found that the statute was not overbroad because, when fairly construed, it banned possession only of depictions which constitute child pornography, specifically those materials which depict a minor in a state of nudity where such nudity involved a lewd exhibition or graphic focus on the genitals. The court also determined that the term

"minor" contained in O.R.C. 2907.323(A)(3) meant a person under the age of 18 and that pursuant to O.R.C. 2901.21(B), the degree of culpability required was that of recklessness. Thus, it concluded that the statute complied with the guidelines established in *New York v. Ferber*, 458 U.S. 747 (1982), for constitutionally permissible regulation of child pornography. Reviewing the evidence, the Ohio Supreme Court held that Osborne was properly convicted of a violation of O.R.C. 2907.323(A)(3).

4. Osborne filed a motion for rehearing which the Ohio Supreme Court denied, *see* 38 Ohio St. 3d 718, 533 N.E. 2d 788 (1988). He then appealed to this Court. Probable jurisdiction in part was noted on June 26, 1988. The additional questions presented by Osborne were dismissed for lack of jurisdiction and certiorari was denied 492 U.S. ____, 106 S. Ct 563.

SUMMARY OF ARGUMENT

Child pornography constitutes a threat to the physical and psychological well-being of children, *New York v. Ferber*, 458 U.S. 747 (1982), and is beyond the pale of First Amendment protection discussed in *Stanley v. Georgia*, 394 U.S. 557 (1969). Thus, the state may prohibit the possession of such materials without infringing on the First Amendment rights of the possessor.

Even if this court determines that the possession of child pornography is protected activity, the state's compelling interest in the safeguarding of children would override the right to possess such materials. The possession of child pornography adversely affects children because, among other things, it reduces to a recording pornography that might haunt the child in the future, violates the child's privacy interest, and is used by pedophiles to further the sexual abuse of children by enticing them to participate in sexual activity. This is so irrespective of whether child pornography flows in and out of commerce. Given the relatively insubstantial First Amendment value of the possession of child pornography, the state's compelling interest in prohibiting

child pornography renders constitutionally permissible statutes such as O.R.C. 2907.323(A)(3).

Consistent with *Ferber*, child pornography includes not only depictions of children engaged in physical contact of a sexual nature but depictions of children in a state of nudity involving a lewd exhibition or a graphic display of the genitals. The latter results in harm to children every bit as devastating as does the former.

Ohio Revised Code 2907.323(A)(3), which prohibits possession of depictions of children in a state of nudity involving a lewd exhibition or a graphic display of the genitals, is not overbroad. Its reach is limited to activities which do not enjoy First Amendment protection and Appellant has failed to demonstrate that there is a probability that O.R.C. 2907.323(A)(3) as authoritatively construed by the Ohio Supreme Court will reach a substantial number of impermissible applications. Therefore, substantial overbreadth requiring invalidation of the statute is not present.

Ohio Revised Code 2907.323(A)(3) is narrowly tailored to further the state's compelling interest—the protection of children from the ravages of child pornography. As authoritatively construed, the statute carefully avoids infringing on the possession of depictions which might be protected by the First Amendment and instead applies only to unprotected materials.

Finally, because O.R.C. 2907.323(A)(3), as authoritatively construed by the Supreme Court of Ohio, is constitutional, Appellant pins his hopes for reversal on the assertion that the lower court's construction of O.R.C. 2907.323(A)(3) represents a "rewriting" of the statute that deprived him of fair notice of the nature of proscribed conduct. The court below, however, reasonably interpreted Ohio's statute, as written by the Ohio General Assembly, when it held that 1) the term "minor" meant a person younger than the age of eighteen; 2) identified "recklessness" as the appropriate degree of scienter; and 3) equated the term "nudity" with

"lewd exhibition" or "involved a graphic focus on the genitals."

ARGUMENT

I. THE STATE OF OHIO MAY, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, PROHIBIT THE PRIVATE POSSESSION OF CHILD PORNOGRAPHY.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court found that a Georgia statute making criminal the private possession of obscene material impermissibly infringed on the right to receive information and the right to privacy guaranteed by the First and Fourteenth Amendments. Thus, the Court held that a statute regulating obscenity may not reach into a person's home. It noted that its opinion did not infringe on the power of the State to criminalize the possession of other items which had no First Amendment component such as narcotics or criminal tools. *Id.*, at 568 n. 11. Subsequently in *New York v. Ferber*, 458 U.S. 747 (1982), the Court hold that child pornography was so deleterious to the psychological and physical weltare of children that it was beyond the pale of First Amendment protection. As this brief will demonstrate, the harm to children discussed by the Court in *Ferber* is no less when child pornography is possessed than when it is produced or distributed. Moreover, there is evidence that child pornography possessed by pedophiles is used to entice or conditon a child to participate in sexual activity. It is a tool to ease the commission of sexual abuse against children. *Potuto, Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky L. J. 15, 44-45, (1987) ("*Potuto*"). Thus, the possession of child pornography is analogous to the possession of criminal tools discussed in *Stanley* and is entitled to no more constitutional protection.

Even if it were held that Appellant has a First Amendment interest in possessing child pornography, Ohio still may prohibit such conduct. In *Stanley*, the Court expressly

refrained from expressing an opinion on the validity of other statutes making criminal the otherwise lawful possession of printed, filmed or recorded material, such as that affecting national security. But the Court observed that in such cases "compelling reasons may exist for overriding the right of the individual to possess those materials." *Id.* at 568 n.11.

That a state has a compelling interest in the regulation of child pornography, even that which is not obscene, was confirmed in *Ferber*. At the outset of its opinion, the Court recognized that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." 488 U.S. at 749. Although the statute at issue in that case, one which prohibited the distribution of material depicting sexual performance by minors, ran "the risk of suppressing protected expression," 458 U.S. at 756, the Court was "persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* This conclusion was based first on undisputed fact that the state interest in safeguarding the physical and psychological well-being of its children was *compelling*. The Court declined to second guess New York's legislative judgment in determining that child pornography was directly related to the sexual abuse and exploitation of children. Indeed, the Court's independent review of relevant literature confirmed the accuracy of the proposition that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." 458 U.S. 758 n. 9. In contrast to the state's interest, the Court found that it was "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important part of a literary performance or scientific or educational works." 458 U.S. at 763.

The state's compelling interest in the well-being of its minor citizens is significantly advanced when it prohibits the possession of child pornography. For it is clear that possession itself results in great harm to children. Such material continues to exploit and victimize children. *Ferber*, 458 U.S. at 760 n. 10 ("Because the child's actions are

reduced to a recording the pornography may haunt him in future years, long after the original misdeed took place.") (Citation omitted.) Children have a privacy interest in having photographs shielded from the view of others. *Id.* And child pornography is often used to facilitate further sexual abuse of children through enticement of children to participate in sexual activity. *Potuto*, citing *Attorney General's Commission On Pornography, Final Report* (July, 1988);[2] *Note, Protection of Children From Use In Pornography: Toward Constitutional And Enforceable Legislation*, 12 U. Mich. Law Reform 295, 300-301 (". . . child pornography appears to play a special role in the molestation of children"). The same overriding state interest which led the Court to uphold the New York statute in *Ferber* animates the Ohio statutes making possession of child pornography a crime.

Appellant asserts that the State's interest is limited to regulating the production and sale of child pornography, so as to protect children from the harm of being posed in sexual conduct and having photographs circulate in commerce. Appellant's Brief at 31. Of course, amici concur with Appellant that a state has a compelling interest in regulating the circulation of child pornography. Appellant ignores, however, the disturbing fact that the underground child pornography market includes the private, non-commercial production and exchange of child pornography. H.R. Rep. No. 536, 98th Congress, 1 Sess. 2, 11 (1983), cited in *Potuto* at 44 n.124.[3] Consequently, the state's compelling interest in controlling child pornography necessarily extends beyond the mere regulation of commerce. Indeed, the state's interest in prohibiting the possession of child pornography is every bit as compelling as its interest in prohibiting its

[2] "Apparently, virtually all child sexual abusers possess child pornography." *Potuto*, at 26.

[3] Thus, in enacting the Child Protection Act of 1984, Congress deleted the "for commercial purpose element" of the offense of transmitting or receiving child pornography through the mail. 18 U.S.C. §2252(a). *Note, Behind Closed Doors - The Clandestine Problem of Child Pornography*, 21 Creighton L. J. 917, 924 (1986). ("Behind Closed Doors").

commercialization. *See Potuto*, at 51 ("An at-home possessor seems more likely than a commercial distributor to use pornography in ways, such as enticing children to sexual activity, that involve the intertwined child pornography enterprise.")

Unlike *Stanley*, where the harm of possession of obscenity posited by the State—harm to the possessor himself—was considered by the Court to be insubstantial or based upon mere speculation, the harm involved in the possession of child pornography—the sexual exploitation and abuse of children—is real and involves a governmental concern of surpassing importance. As such, it is a compelling reason "for overriding the right of the individual to possess those materials" which might otherwise be protected under *Stanley*.

II. THE PRINCIPLES ESTABLISHED IN *NEW YORK V. FERBER* PERMIT A STATE TO PROHIBIT POSSESSION OF DEPICTIONS OF CHILD NUDITY, WHERE SUCH NUDITY INVOLVES A LEWD EXHIBITION OR A GRAPHIC FOCUS ON THE GENITALS.

In *New York v. Ferber, supra*, the Court established the contours of a constitutionally valid statute regulating child pornography. Of primary importance to this case, the conduct prohibited must be adequately defined by the applicable statute, as written or authoritatively construed. See, *Ferber*, 458 U.S. at 764. The category of conduct proscribed in the case of the New York statute—sexual conduct—had to be suitably limited and described.[4] Although *Ferber* made clear that 'nudity without more is protected expression. . .," 458 U.S. at 765 n. 18, the Ohio statute does involve "more." A review of the Ohio statutory scheme of which O.R.C. 2907.323(A)(3) is a part and the authoritative construction

[4] The Court also required that a statute regulating this area specify the age of minority, 458 U.S. at 764, and contain an element of scienter, 458 U.S. at 765. As noted in Part III, O.R.C. 2907.323 as fairly and authoritatively construed contains each of these elements.

of O.R.C. 2907.323(A)(3) by the Ohio Supreme Court reveals that the proscription contained therein comports with the requirements of the First Amendment as considered in *Ferber*.

A. Ohio Revised Code 2907.323(A)(3) Prohibits The Possession Of Child Pornography.

The Ohio statutory scheme regulating child pornography is a continuum involving three separate sections. The first, O.R.C. 2907.321, (A-2), prohibits pandering obscenity involving a minor. Among its proscriptions is the production, exhibition, advertising, presentation, or possession of obscene material involving a minor. The second provision, O.R.C. 2907.322, prohibits among other things the production, exhibition, advertising, presentation or possession of material which depicts a minor participating or engaging in "sexual activity,"[5] masturbation, or bestiality. The third and last statute in the continuum is O.R.C. 2907.323 which in subsection (A)(3) prohibits the possession or viewing of material depicting a minor who is in a state of nudity[6] where such nudity consists of a lewd exhibition or involves a graphic

[5] "Sexual activity" for the purposes of O.R.C. 2907.322 is defined in O.R.C. 2907.01(C) as "sexual conduct or sexual contact, or both." In turn, O.R.C. 2907.01(A) defines "sexual conduct" as ". . . vaginal intercourse between a male and a female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." (A-1.) O.R.C. 2907.01(B) defines "sexual contact" as ". . . any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." (A-1.)

[6] "Nudity" is defined in O.R.C. 2907.01(H) as ". . .the showing, representation or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state." (A-2.)

focus on the genitals" (Jt. App. 42).

Thus, it is clear that Ohio is not trying to proscribe "mere nudity." Rather, through O.R.C. 2907.323(A)(3), it is, as held by the Ohio Supreme Court, outlawing only conduct which is not morally innocent—i.e. possession of depictions which constitute child pornography.

The materials the possession of which Ohio forbids through O.R.C. 2907.323(A)(3) do not, as Appellant repeatedly asserts, fall outside the permissible boundaries of state regulation described in *Ferber*. Appellant reads *Ferber* as standing for the propostion that child pornography consists only of those materials which would depict what is defined under Ohio law as "sexual activity," *see* n. 4, *supra*, that is, depictions of actual physical contact of a sexual nature. Appellant's Brief at 35. It is true that *Ferber* spoke of child pornography in the context of sexual conduct. It did so because that was the issue with which it was presented. More importantly, the definition of "sexual conduct" contained in the New York statute approved in *Ferber* included not only matters involving actual physical touching or contact of a sexual nature but "lewd exhibition of the genitals." 458 U.S. at 765. Thus, the requirement of sexual conduct as used by the Court in *Ferber* is broad enough to encompass the material proscribed by O.R.C. 2907.323. This is an eminently sensible reading, for child pornography "[a]t the very least involves the posing of a child in a

[7] Appellant complains that the terms "lewd" and "graphic" do not adequately describe that which Ohio is attempting to prohibit, or at least do not detract from his claim that O.R.C. 2907.323(A)(3) prohibits possession of mere nudity. Appellant's brief at 32-33. Such is not the case. The term "lewd" has been used by the federal government in its child pornography statute. *United States v. Nemuras*, 567 F.Supp. 87 (D. Md. 1983 ("lewd" has generally well-recognized meaning connoting sexual suggestiveness). And the term "graphic" has likewise been used to describe sexually oriented material not protected by the First Amendment. *See, e.g., United States v. Various Articles of Merchandise*, 600 F.Supp. 1383, 1387 (1985) (describing seized publications as containing photographs with "graphic display of genitalia.").

suggestive fashion and in circumstances likely to cause nervousness, shame, and anxiety." *Potuto* at 40; and see *Behind Closed Doors, supra,* at 917 ("Child pornography is a form of sexual abuse which shows children as young as three years of age engaged in such activities as *lewd poses,* masturbation, intercourse, fellatio, cunnilingus, rape, incest and sadomasochism") (citations omitted, emphasis added).

Appellant's assertion that the State has a compelling interest in regulating only material which (1) depicts minors engaging in sexual conduct which involves physical contact or touching and (2) is commercially distributed is erroneous. There is ample authority from which to conclude that sexually suggestive photographs of children harm those children in a demonstrable fashion. A child may suffer embarrassment or shame in posing nude in a seductive manner. *Potuto* at 76. A child who poses or is forced to pose in a sexually explicit manner will be no less haunted in future years by knowledge that a photograph memorializing his conduct is somewhere "out there" than if the photograph were of him engaging in physical contact of a sexual nature.[8] Cf. *Ferber,* 458 U.S. at 759 n. 10. Such a child's privacy is invaded just as much. *Id.* And, unlike adults, children cannot give informed consent to the production, distribution, or possession of sexually explicit and exploitive photographs. *Cf. Bellotti v. Baird,* 443 U.S. 622, 634-637 (1979) (inability of children to make decisions in an "informed, mature manner"). Such

[8] "In a hearing before the Senate Judiciary Committee, for example, one expert was asked: 'How harmful is it for a child to be photographed in a sexually explicit position? What is the long range impact on the psyche or life of that child?' Her response was: 'It is not just the photograph but it is what happens afterward, where all of the photos go. And there [sic] always are sexually molested, debased, raped, whatever, that is all part of the whole scene.'" Question by Sen. Arlen Spector (Pa.) and answer by Ann Burgess, Prof. Psychiatric Nursing, Univ. Pa., recounted in *Potuto* at 39 (citation omitted).

poses are child abuse.[9] *Behind Closed Doors, supra,* at 917. In sum, the children involved in sexually suggestive photographs are likely to suffer profound emotional and physical damage.

Although the focus of the court in *Ferber* was on commercial distribution of child pornography, that being the evil that the New York statute proscribed, it cannot be doubted that even child pornography outside the stream of commerce has effects which the State justifiably may seek to eradicate through the criminalization of such material. As noted in Part I, the harmful effects of possession exist whether or not the possessor obtained the illicit material through commerce or otherwise. Moreover, private, non-commercial channels of distribution play a large part in the underground pornography market. The way in which Appellant obtained the four pictures of a nude male child in sexually suggestive poses illustrates the point.

Thus, the State has a compelling interest in prohibiting the possession of depictions of nude children in sexually suggestive poses. Because O.R.C. 2907.323(A)(3) regulates child pornography only, it is consistent with *Ferber* and passes constitutional muster.

B. Ohio Revised Code 2907.323(A)(3) Is Not Overbroad.

"The First Amendment doctrine of overbreadth is an

[9] The fact that physical contact of a sexual nature is not portrayed in the depiction does not mean that such conduct has not occurred during the production of the depiction. "Most of [the] harm [to the child] results from sexual molestation from adults, whether it is recorded on film or not. Even if the child is photographed alone or with other children in simulated acts, the producers of the visual material often engage in sexual activity with the child before and after photographing. Thus, the absence of adults in the visual material does not mean that the child has not been sexually assaulted by an adult." *Note, Protection of Children From Use In Pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich J.L. Ref. 295, 300 and nn. 35-36 (1979).

exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the basis that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, ___ U.S. ___, 109 S. Ct. 2633, 2637 (1989) (citations omitted). The doctrine is based on the premise that an overly broad statute may chill others from exercising their right of expression guaranteed under the First Amendment. *Id.* Because application of the overbreadth principle may result in the striking down of a statute at the instance of one whose conduct may be punished despite the First Amendment, the Court has carefully limited its scope. The overbreadth doctrine, therefore, has been characterized as strong medicine and "employed . . . with hesitation, and then 'only as a last resort.' " *Ferber*, 458 U.S. at 769, quoting from *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Particularly where conduct and not speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770.

Ohio Rev. Code 2907.323(A)(3) regulates conduct, not pure speech, and any overbreadth attack must be evaluated in light of the test established in *Broadrick* and applied to child pornography in *Ferber*. Appellant's claim of overbreadth is predicated on the notion that because O.R.C. 2907.323(A)(3) does not regulate materials depicting sexual conduct which are placed into the stream of commerce, it does not regulate child pornography but rather material protected by the First Amendment.

Appellant's assertions are incorrect. As demonstrated earlier, O.R.C. 2907.323(A)(3) as authoritatively construed by the Ohio Supreme Court prohibits possession of materials which fall within the scope of the term "sexual conduct" as used by the Court in *Ferber* and the New York child pornography statute at issue. Moreover, it is clear that child pornography distributed outside the stream of commerce has harmful effects on children which are no less worthy of the State's attention than child pornography conveyed within the stream of commerce. In sum, the State of Ohio through O.R.C.

2907.323(A)(3) has prohibited child pornography, a category of material left unprotected by the First Amendment whether or not it is distributed in commerce.

In any event, the material prohibited by O.R.C. 2907.323(A)(3) and possessed by Appellant is unprotected child pornography. Because Appellant has failed to demonstrate that there is a probability that the statute would reach a substantial number of impermissible applications, *Ferber*, 458 U.S. at 771, substantial overbreadth which would invalidate the statute is not present.

C. Ohio Rev. Code 2907.323(A)(3) Is Narrowly Tailored To Meet The Compelling State Interest In Preventing The Harmful Effects To Children Related To The Possession Of Child Pornography.

Appellant argues that O.R.C. 2907.323(A)(3) is not narrowly tailored to serve the compelling state interest of safeguarding its children on the basis that O.R.C. 2907.323(A)(3) does not protect children from sexual abuse. This is so, Appellant claims, because O.R.C. 2907.323(A)(3) does not, as do O.R.C. 2907.321 and O.R.C. 2907.322, regulate materials that depict children either in an obscene way or engaging in masturbation, bestiality, or physical contact of a sexual nature. But Appellant ignores the authority cited in Part I which details the sexual abuse and harm that are attendant in the production of sexually provocative depictions of physical contact of a sexual nature. Moreover, Appellant completely ignores the very real harm to children caused by possession of the type of child pornography prohibited by O.R.C. 2907.323(A)(3). In light of these facts, it cannot be denied that O.R.C. 2907.323(A)(3) is narrowly tailored to protect children from the harm of possession of child pornography. There is, quite simply, no other way to do it.

Nor does the fact that Ohio chose to place within O.R.C. 2907.323 certain exemptions detract from its validity. First, the exemptions serve to limit the scope of the statute to the regulation of a variety of child pornography. *Ohio v. Young*,

37 Ohio St. at 251-252 (Jt. App. 42). The exemptions confirm that protected conduct is outside the scope of the statute. Although it is clear from *Ferber* that an overbreadth attack on O.R.C. 2907.323(A)(3) would not succeed even in the absence of the exemptions, Ohio has chosen to make clear that it has not proscribed possession for proper reasons such as medical or education uses. See *Ferber*, 458 U.S. at 766-67 (New York Court of Appeals found statute overbroad because it might prohibit the sale or use of the proscribed material for medical or educational reasons); *see also* concurrence of Justice Brennan, 458 U.S. at 776. ("The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not "de minimus.' "). Similarly, the parental exception of O.R.C. 2907.323(A)(3)(b) serves to exclude from the law the idea that it would "make a criminal out of a parent who takes a full frontal view picture of his or her naked one-year old running on a beach or romping in a wading pool." *Massachusetts v. Oakes* 109 S. Ct. at 2637 (citing *Commonwealth v. Oakes*, 401 Mass. 602, 518 N.E. 2d 836, 838 (1988)); *see also* dissenting opinion of Justice Brennan 458 U.S. at 2643. These exemptions are evidence of legislative sensitivity to the First Amendment.

Petitioner was convicted of engaging in conduct, possession of child pornography, which was not protected by the First Amendment. The statute under which he was convicted was narrowly drawn to advance Ohio's compelling interest in protecting its children. Thus, it withstands constitutional scrutiny.

III. THE OHIO SUPREME COURT'S CONSTRUCTION OF OHIO REVISED CODE 2907.323(A)(3) IS CONSISTENT WITH THE SECTION'S LANGUAGE AND IS NOT THE EQUIVALENT OF AN EX POST FACTO LAW AS APPLIED TO APPELLANT.

It is settled law that "child pornography . . . is unprotected speech subject to content-based regulation." *Ferber*, 458 U.S. 747, 765 n.18. As previously discussed, Ohio's statute,

as "authoritatively construed", *see Ferber*, 458 U.S. at 764, comfortably satisfies the test established for determining the constitutionality of child pornography legislation.

Appellant's last resort, therefore, is to characterize as "ex post facto" in nature the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3), as applied to him. Appellant argues that the "version" of O.R.C. 2907.323(A)(3) under which he was tried 1) gave him no fair notice of the definition of the term "minor", 2) did not require any showing of scienter, and 3) could not be read as the Ohio Supreme Court did, equating the term "nudity" with "lewd exhibition" or "involves a graphic focus on the genitals." In effect, Appellant argues that O.R.C. 2907.323(A)(3) is void for vagueness. A review of relevant case and statutory law, however, compels a different conclusion than the one drawn by Appellant.

A. The Ohio Supreme Court Correctly Interpreted The Term "Minor" As Someone Younger Than Eighteen Years of Age.

In order to be invalidated on grounds of vagueness, a statute must fail to inform a person of average intelligence of the nature of proscribed activity. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine, therefore, is designed to address the issue of whether legislation adequately describes what constitutes illegal conduct. *See Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.), *cert denied*, 398 U.S. 965 (1970) (statute need not be drafted with "meticulous specificity").

Statutory construction begins with the "fundamental canon . . . that . . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). *Webster's New Collegiate Dictionary* (1979) defines "minor" as "a person who has not attained majority." *Id.* at 727; *see also Black's Law Dictionary* 899 (5th Ed. 1979) ("In most states, a person is no longer a minor after reaching the age of 18."); O.R.C. 3109.01 (defining the age of majority in Ohio as

eighteen). Thus, consistent with the Court's pronouncement in *Perrin*, the omission from O.R.C. 2907.323(A)(3) of a specific statutory definition of "minor" requires that the term be construed, for purposes of O.R.C. 2907.323(A)(3), as taking its common meaning, which is a person under the age of eighteen.[18] This is exactly what Ohio's courts did in the case at bar. This construction of "minor" is both commonsensical, in that it is the likely construction to be given the word by a person of average intelligence, and mandated by the Court's previous holdings.

B. Ohio Revised Code 2907.323(A)(3) Is Governed By A Specific Degree Of Scienter As Required By *Ferber*.

According to the Court's holding in *Ferber*, "criminal responsibility [in respect to child pornography laws] may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. (Citation omitted.) Although it is true that O.R.C. 2907.323(A)(3) makes no reference to the degree of scienter necessary to establish culpability, this does not mean that Ohio Law is silent on the subject. To the contrary, the degree of scienter necessary for purposes of conviction under O.R.C. 2907.323(A)(3) plainly is spelled out in the Ohio Revised Code.

Pursuant to O.R.C. 2901.21:

> [w]hen the section defining an offense . . . neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense. (A-1)

As noted, O.R.C. 2907.323(A)(3) makes no reference to culpability. In addition, it is not "plain" from the language

[18] At trial, Appellant proposed a jury instruction that would have established fifteen as the age of majority for purposes of O.R.C. 2907.323(A)(3). (R.7.) Interestingly, Appellant's uncontradicted testimony was that the young boy photographed was fourteen when his picture was taken. (Jt. App. 16.)

of O.R.C. 2907.323(A)(3) that the Ohio General Assembly intended strict liability to be the standard for conviction. It necessarily follows that "recklessness" is the degree of culpability necessary to justify conviction under Ohio law. Further, "recklessness" is defined under Ohio law in a manner sufficient to satisfy *Ferber's* requirement that some element of scienter be present. *See* O.R.C. 2901.22(C) (reference to recklessness being "the equivalent of a perverse [ ] disregard [ ] [for] a known risk") (A-1). (Emphasis added.)

C. The Ohio Supreme Court Correctly Interpreted The Meaning Of The Term "Nudity" For Purposes Of Ohio Revised Code 2907.323(A)(3).

The final prong of Appellant's "retroactivity" attack on O.R.C. 2907.323(A)(3) is his contention that the Ohio Supreme Court "rewrote" the definition of "nudity" in order to affirm his conviction. A review of the Ohio Supreme Court's analysis of O.R.C. 2907.323(A)(3), however, reveals that the court interpreted nudity for purposes of the Ohio statute in the only reasonable fashion.

The court below began its discussion of the term "nudity" by recognizing in all candor that "[i]t is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state [of] nudity to a lewd exhibition or a graphic focus on the genitals." *Young*, 37 Ohio St. 3d at 251 (Jt. App. 42). Nevertheless, the court correctly pointed out that the scope of "nudity" was significantly narrowed by the "proper purposes" exceptions contained in subparagraphs (a) and (b) of the Ohio statute. *Id.* The court continued its analysis by noting that:

> [t]he clear purpose of these exceptions . . . is to sanction possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is not morally innocent, i.e., the possession or viewing of the

described material for prurient purposes.

Young, 37 Ohio St at 252 (Jt. App. 42). The court correctly concluded that the "proper purposes" exceptions limited the application of O.R.C. 2907.323(A)(3) t[illegible] universe of child pornography. *Id.*

The Ohio Supreme Court's interpretation of the term "nudity", read in the context of O.R.C. 2907.323(A)(3), makes far more sense than does Appellant's reading of the statute as a whole. First, the Ohio statute does not prohibit a parent from possessing a nude photograph of his child. *See* O.R.C. 2907.323(A)(3). Consequently, it does not prohibit possession of a photograph of a "baby on the bearskin rug." Second, the exceptions to the proscriptions contained in O.R.C. 2907.323(A)(3) make it plain that possession for any purpose that falls within the perimeters of expression protected by the First Amendment is not regulated by the Ohio statute. A simple process of elimination results in the conclusion that O.R.C. 2907.323(A)(3) is directed only toward unprotected expression. Rather than rewriting O.R.C. 2907.323(A)(3), the Ohio Supreme Court properly interpreted the statute as written by the Ohio General Assembly.

Historically, this Court has approached vagueness challenges to legislation that regulates unprotected expression and activity in a manner consistent with the following passage from *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 578-79 (1973):

> There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary

> common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Read in this light, Appellant's vagueness challenge to O.R.C. 2907.323(A)(3) must fail."

" In any event, since the Ohio Supreme Court restricted the reach of the possession statute, rather than expanding its scope or making prosecution easier, as in *Miller v. California*, 413 U.S. 15, 24-25 (1973), the rule established in *Marx v. United States* 430 U.S. 188, 194-97 (1977) does not apply. Appellant is not entitled to retrial and this Court can affirm his conviction under the harmless error rule of *Pope v. Illinois*, 481 U.S. ___, 95 L. Ed. 2d 439, 445-47) (1987).

CONCLUSION

The state's interest in protecting children is of such overriding importance that it permits the prohibition of the possession of child pornography, whether or not the possession of such materials otherwise would be protected by the First Amendment. Moreover, depictions of children in a state of nudity which consists of a lewd exhibition or a graphic display of the genitals are child pornography and fall within the permissible reach of state regulation. Ohio Revised Code 2907.323(A)(3), as authoritatively construed by the Ohio Supreme Court, therefore lawfully prohibits the possession of child pornography. Appellant had fair notice of its terms. Accordingly, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney of Ohio

LOREN L. BRAVERMAN
Deputy Chief Counsel
Counsel of Record

ANDREW I. SUTTER
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Counsel for Amici Curiae

APPENDIX TO BRIEF FOR AMICI
APPENDIX A

OHIO REVISED CODE 2901.21

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2901.22

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to the circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

. . .

(portions omitted)

OHIO REVISED CODE 2907.01

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercoure, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal

intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

. . .

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(portions omitted)

* * *

OHIO REVISED CODE 2907.321

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any obscene material that has a minor as one of its participants or portrayed observers;

(3) Create, direct, or produce an obscene performance that has a minor as one of its participants;

(4) Advertise for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;

(5) Possess or control any obscene material, that has

a minor as one of its participants;

(6) Bring or cause to be brought into this state an obscene material that has a minor as one of its participants.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2907.322

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2907.323

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian or custodian consents in writing to the photographing of the minor, to the use of the minor in the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or

ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(3) of this section, illegal use of a minor in a nudity-oriented material or performance is a felony of the fourth degree.

APPENDIX B

STATE STATUTES PROHIBITING POSSESSION OF CHILD PORNOGRAPHY

1. MINNESOTA - § 617.247, Minnesota Statutes (1983).

2. ARIZONA - § 13-3553, Arizona Revised Statutes (1983).

3. NEVADA - § 200.730, Nevada Revised Statutes (1983).

4. ALABAMA - § 13A-12-192, Code of Alabama (1984).

   Upheld in *Felton v. State*, 526 So.2d 635 (Ala. Cr. Ap. 1986), *Aff'd*, 526 So.2d 638 (Ala. Sup. Ct. 4-8-88), *reh. denied* 5-20-88.

5. OHIO - § 2907.321, § 2907.322, § 2907.323 Ohio Revised Code (1984).

   § 2907.322 upheld in *State v. Meadows*, 28 Ohio St. 3d, 43 503 N.E.2d 697 (Ohio 1986) *cert. denied* 480 U.S. ——, 94 L.ED.2d 771, 107 S.Ct. 1581, (1987).

6. OKLAHOMA - § 1021.2, Oklahoma Statutes (1984).

7. WASHINGTON - § 9.86A.070, Revised Code of Washington (1984).

8. TEXAS - § 43.26, Texas Penal Code Ann. (1985).

9. FLORIDA - § 827.071, Florida Statutes (1985).

10. UTAH - § 76-5a-3, Utah Code Ann. (1985).

11. ILLINOIS - § 11-20.1, Illinois Revised Statutes (1985).

Upheld in *People v. Geever*, 122 Ill.2d 313, 522 N.E.2d 1200 (Illinois 1988).

12. KANSAS - § 21-3516, Kansas Statutes Ann. (1986).

13. GEORGIA - § 16-12-100, Code of Georgia Ann. (1987).

14. MISSOURI - § 573.037, Missouri Revised Statutes (1987).

15. IDAHO - § 18-1507(3)(b) and §18-1507A, Idaho Code (1987).

16. S. DAKOTA - § 22-22-23.1, South Dakota Codified Laws Ann. (1987).

17. NEBRASKA - § 28.808, Revised Statutes of Nebraska (1988).

18. COLORADO - § 18-6-403, Colorado Revised Statutes (1988).

19. WEST VIRGINIA - § 61-8C-3 and § 61-8D-6, West Virginia Code (1988).

No. 88-5986

SEP 18 1989

IN THE

Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal From The Supreme Court Of Ohio

BRIEF OF COVENANT HOUSE AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *AMICI CURIAE*

GREGORY A. LOKEN*
Institute for Youth Advocacy
Covenant House
460 West 41st Street
New York, New York 10036
(212) 613-0349

JUDITH DRAZEN SCHRETTER
National Center for Missing
& Exploited Children
2101 Wilson Blvd. Suite 550
Arlington, Virginia 22201
(703) 235-3900

**Counsel of Record*

Counsel for Amici Curiae

QUESTION PRESENTED

It is unconstitutional for a state to protect the privacy, autonomy, and dignity of children exploited in graphic pornography by outlawing the private possession and viewing of such materials unless they have substantial scientific, artistic or educational value?

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No. 88-5986

IN THE

Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant

vs.

STATE OF OHIO,

Appellee

BRIEF *AMICI CURIAE*

Covenant House and the National Center for Missing and Exploited Children respectfully submit this brief *amici curiae* in support of the State of Ohio in this case. The written consents of the parties have been obtained and submitted to the Clerk.

STATEMENT OF INTEREST

Covenant House is a not-for-profit, tax-exempt organization, incorporated in New York, that takes as its mission the shelter and care of homeless and runaway children. Currently its programs are located in New York, Houston, Toronto, Fort Lauderdale, New Orleans, Anchorage, Los Angeles, and Central America, and serve over 20,000 destitute children and teenagers each year. Those youths have generally been exposed to the worst of street life, with an estimated 50 percent involved in formal or informal prostitution to survive, and a substantial number involved in child pornography as well. To urge young people to avoid the desperation of streetlife, Covenant House in 1987

launched a national toll-free hotline—the "NINELINE"—for children and families at risk. In the past two years 130,000 crisis calls have been received and responded to by the NINELINE.

Because of its focus on the needs of "street kids," Covenant House has been a leader in battling child pornography and other forms of sexual exploitation. As *amicus curiae* Covenant House filed briefs in *New York* v. *Ferber*, 438 U.S. 747 (1982); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988); and *Massachusetts* v. *Oakes*, 491 U.S. ___, 105 L.Ed.2d 493 (1989). As advocate during the past decade Covenant House played important roles in drafting and obtaining passage of the Child Protection Act of 1984, 18 U.S.C. §§2251-2254, 2256, and the Child Abuse Victims Rights Act of 1986, 18 U.S.C. §2255, which together form the core of the federal attack on the child pornography industry.

The National Center for Missing and Exploited Children (the "Center") is a nonprofit, tax-exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, and encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement three tasks under the Missing Children's Assistance Act (Public Law 98-473; 42 U.S.C. §§5771-5777): to operate the national toll-free hotline for reports of missing children; to operate the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and to assist OJJDP in performing its task of coordinating federally funded programs relating to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, to 39 state missing children clearinghouses, 130 nonprofit organizations, and interested child advocates, and training to professionals on investigation and prosecution of child pornography.

The Center has disseminated more than 1.7 million free copies of the eight books and 11 brochures it has developed, including four specifically devoted to child sexual victimization: *Child Pornography and Prostitution: Background and Legal Analysis* (produced in cooperation with Covenant House and the U.S. Department of Justice), *Children Traumatized in Sex Rings*, *Interviewing Child Victims of Sexual Molestation*, and *Child Molester: A Behavioral Analysis*. The Center's *Selected State Legislation* identifies model legislation related to children, including laws against sexual exploitation.

Because both Covenant House and the Center know through their work the unique agony experienced by children used in graphic pornography, they seek in this brief to bring the perspective of those children to bear on the legal questions at issue in this case.

SUMMARY OF THE ARGUMENT

It is the consensus view of scholars, clinicians, and of this Court that the use of children in explicit pornography is an outrage against which the states are entitled to take the strongest possible actions. *New York* v. *Ferber*, 458 U.S. 747 (1982). In the statute challenged here, Ohio has forbidden the possession of materials which graphically focus on the genitals of a child, unless such materials have a legitimate scientific, educational, artistic or other purpose. Ohio Rev. Code Ann. §2907.323(A)(3) (Anderson 1987).

Because possession and private viewing of child pornography perpetuate its existence, such activities deeply violate the ex-

ploited child's privacy and threaten his or her ability to build a life free of the threats of blackmail and public exposure of the materials. From an adult viewer's perspective, by contrast, such materials have no value as meaningful "speech" and are, in any case, *nonconsensual* "speech" by the children abused. They are thus not distinguishable under the First Amendment from the "speech" received by a peeping tom or an electronic eavesdropper, but are wholly different from the consensually produced adult obscenity at issue in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Ohio's statute is a laudable, constitutional exercise of its responsibilities to protect the young from exploitation.

Appellant's more technical attacks on his conviction are equally unfounded. The Ohio statute gave him ample, eminently "fair" warning that his conduct would be found illegal under the statute as construed by the state courts, and he is thus in no position to resurrect the statute's asserted pre-construction overbreadth as grounds for overturning his conviction. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). Likewise, his attacks on the *Ferber* Court's approval in child pornography statutes of "lewd exhibition of the genitals" or the Ohio Supreme Court's more specific formulation of "graphic focus" on the genitals are both unfounded in precedent and insensitive to the privacy interests such statutes are designed to protect.

Ohio's statute, as authoritatively construed by its highest court, is constitutional on its face and as applied to Appellant, and the decision below should be affirmed.

INTRODUCTION

> But somehow the stuff that I did for (name of pornographer) and that I let them film and I know people saw, I just don't think I can touch any girl. I don't even mean sex. I mean I can't love anyone good. I'm like an animal. Why would she want to have anything to do with me?
>
> —Mike, former street kid[1]

Used in hard-core pornography while enmeshed in street life at age 16, Mike was still not clear of the nightmare eleven years later. As reported by the San Francisco program to which he came for help, he arrived "alone, and wanting to die."[2] Two years of intensive intervention were required at that point "to bring him to separate the acts from himself and the past from his future", and fully five years elapsed before his life contained a healthy relationship with a woman.[3]

In 1982 this Court found as "easily [passing] muster under the First Amendment" the legislative judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York* v. *Ferber*, 458 U.S. 747, 758. Subsequent developments in law[4]

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[1] Quoted in M. Silbert, *The Effects on Juveniles of Being Used For Prostitution and Pornography* 23 (1986), appended to E. Mulvey & J. Haugaard, *Report of the Surgeon General's Workshop on Pornography and Public Health* (1986) (hereinafter "Surgeon General's Workshop").

[2] *Silbert, supra* note 1, at 22.

[3] *Id.* at 23.

[4] *See* Child Protection Act of 1984, Pub. L. No. 98-292, §3, 98 Stat. 204; Child Abuse Victim's Rights Act of 1986, Pub. L. No. 99-591, §§701-705, 100 Stat. 3341-74 (providing civil remedy for children used in pornography). These and other legal responses to the *Ferber* decisions are discussed in H. Davidson & G. Loken, *Child Pornography and Prostitution* 7-12 (Nat'l Center for Missing & Exploited Children 1987); Loken, *The Federal Battle Against Child Sexual Exploitation: Proposals for Reform*, 9 Harv. Women's L. J. 105, 112-115 (1986).

and literature[5] have strongly reinforced that judgment—developments which have clearly not escaped the notice of the Court. *See Massachusetts* v. *Oakes*, ___ U.S. ___, 105 L.Ed.2d 493, 507 (1989) (Brennan, J., dissenting); and *id.* at 504-505 (Scalia, J., concurring and dissenting). Child pornography thus remains "without the protection of the First Amendment", *Ferber*, 458 U.S. at 764, because the prevention of child sexual exploitation is "a government objective of surpassing importance." *Id.* at 757.

A unanimous Court in *Ferber* held that the *circulation* of graphic pornography involving children has no warrant in the First Amendment. Here the central question may be put a little differently: does the First Amendment sanction the existence of child pornography when it comes to rest? That is, does the Constitution protect the ultimate *goal* of those who produce child pornography —to allow a consumer of the material to possess it, preserve it, and enjoy it?

Because of the special, devastating nature of child pornography, in which the most vulnerable of citizens are subjected to sexual abuse followed by nonconsensual revelation of their most private behavior and personal characteristics, the answer cannot be affirmative. The continued existence of a pornographic photograph constitutes a grievous, ongoing injury and threat to the children depicted, while a flat ban on the material poses no threat to adult freedom or privacy. Appellant's exclusive reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is profoundly misguided, and his parsing of overbreadth doctrine from *Ferber* to *Oakes* wholly perverse.

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[5] For a review and discussion of the literature, see *Surgeon General's Workshop*, *supra* note 1, at 13-16, which found that it is the "consensus" of social scientists that "[c]hildren and adolescents who participate in the production of pornography experience adverse, enduring effects." *Id.* at 13.

I. POSSESSION AND PRIVATE VIEWING OF CHILD PORNOGRAPHY ARE UNPROTECTED BY THE CONSTITUTION.

In *Ferber* this Court resolved the constitutional status of child pornography by attending closely to the nature of the harms it causes to children, and then measuring the impact of state intervention on First Amendment freedoms. 458 U.S. at 756-764. Because of *Ferber's* unanimous, uncontroversial character,[6] this case presents no occasion for reconsidering its central insights. Indeed, the only theoretical issue that caused even mild dissension in *Ferber*—whether materials with "serious literary, scientific, or educational value" are exempt from its holding, *compare id.*, 458 U.S. at 766-776, and *id.* at 775-776 (O'Connor, J., concurring) *with id.* at 776-777 (Brennan, J., concurring in the judgment)—is entirely absent here.[7] The task in this case is, by contrast, a relatively narrow one—harmonizing *Stanley* and *Ferber*—but one certain to affect profoundly the capacity of the states to protect sexually exploited children.[8]

A. Possession And Private Consumption Of Child Pornography Constitute Grave Ongoing Harms To Abused Children.

It is the remarkable position of Appellant in this case that: "The state's interest in regulating the private possession of child

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[6] Among commentators *Ferber* has met with virtually unanimous approval. *See, e.g.*, L. Tribe, *American Constitutional Law* 914-915 (1988); Schauer, *Codifying the First Amendment: New York* v. *Ferber*, 1982 S. Ct. Rev. 285 (1983).

[7] The statute challenged in this appeal contains, of course, a full exemption for material that has "a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose", Ohio Rev. Code Ann §2907.323 (A)(3)(a) (Anderson 1987), thus protecting an even greater range of speech than the "value" exception debated in *Ferber*.

[8] For an overview of the practical benefits of possession statutes to law enforcement, see Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 54-71 (1987-88). The difficulties of investigation and prosecution *without* such statutes are outlined in S. Goldstein, *The Sexual Exploitation of Children* 147-174 (1987) (describing the absence of such statutes in most states as "unfortunate", *id.* at 147).

pornography is no greater than its interest in prohibiting the private possession of obscene materials." Appellant's Brief at 31. Wholly unsupported by authority or evidence, that view betrays a bewildering insensitivity to what is at stake for a child coerced or seduced into sexually explicit photography. The continued existence and private viewing of such pornography threatens, in an acutely damaging way, the privacy, autonomy, and dignity of the children victimized.[9]

To say that possessing and viewing child pornography violates a child's "privacy" borders on ludicrous understatement. In such materials a child's genitals are typically put on graphic, sharply focused display, or, even worse, the child is shown in the midst of actual sexual intercourse. It is impossible to conceive any starker violation of "the individual interest in avoiding disclosure of personal matters", *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977), and it was explicitly on privacy grounds that the Court substantially rested its decision in *Ferber*. *See especially* 458 U.S. at 759n.10 (citing *Whalen* and distinguishing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)). Sexuality is at the very core of any conception of the "privacy" interest,[10] and that interest is no less

[9] *Amici* recognize the appeal of arguments that the possession of child pornography threatens children *other* than the ones already abused because of its usefulness by pedophiles as a tool of seduction. Goldstein, *supra* note 8, at 129, but do not rely on that argument here. Nor do *Amici* base their defense of Ohio's statute on empirical assessments of what effects the law will have on the overall *market* for child pornography, although such effects can only be negative. These arguments require a degree of factual speculation not necessary in a case that can be decided based on real injuries to identifiable children's privacy and autonomy interests. *Cf.*, *Ferber*, 458 at 778-779 (Stevens, J., concurring in the judgment).

[10] *See, e.g., The Florida Star v. B.J.F.*, ___ U.S. ___, 105 L.Ed.2d 443, 458 ("privacy" of rape victims is "highly significant" interest), and *id.* at 466 (White, Jr., dissenting); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (protecting minor's privacy in rape case a "compelling" interest that would justify denying the press access to "sensitive details" about the victim); *York* v. *Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) (fraudulently obtained nude photograph which was then circulated held basis for federal civil rights action).

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violated when a child's body is viewed in hundreds of bedrooms than it is by showings in public theatres. It is no solace to the victim of a peeping tom that the perpetrator is watching with binoculars from the comfort of his own living room.

In addition to describing "disclosure of personal matters" as part of the individual interest in privacy, *Whalen* v. *Roe* also placed within its boundaries the "interest in independence in making certain kinds of important decisions", 429 U.S. at 599-600—or what may be termed, more simply, personal autonomy. And it is limpidly evident how the continued existence of child pornography compromises that interest for the children exploited. Most obviously, of course, the possessor of child pornography has the power of literal blackmail over children depicted—a power that is frequently used.[11] More importantly, however, the preservation of such material perpetuates the risk to the child that it will surface in some highly public and embarrassing manner in the future.[12] Experts on sexual abuse emphasize that feelings of "stigmatization" and "powerlessness" are at the heart of the long-term damage such abuse inflicts,[13] and, conversely, that "helping victims regain control over their lives is

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See also, Restatement (Second) of Torts, §652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself."); Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Calif. L. Rev. 772, 851 (1985) (identifying "bodily functions and sexual activities" as at the core of privacy interests needing protection); Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 Golden Gate Univ. L. Rev. 1211 (1980).

[11] Belanger, *et. al.*, *Typology of Sex Rings Exploiting Children* in *Child Pornography and Sex Rings* 51, 52-54 (A. Burgess ed. 1984); Goldstein, *supra* note 8, at 92.

[12] *See Shields* v. *Gross*, 58 N.Y.2d 338 (1983) (nude photographs of child published many years later). As *Whalen* recognized, the mere storage of confidential information "creates a genuine concern that the information will become publicly known and . . . adversely affect [patients'] reputations." 429 U.S. at 600.

[13] Finkelhor, *The Trauma of Sexual Abuse* in *Lasting Effects of Sexual Abuse* 61, 70-72, 75-77 (G. Wyatt ed. 1988); Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 292 (1980).

critical to the recovery process".[14] Possession—*i.e.*, preservation—of child pornography by another denies children such control, and can only contribute to the devastating "learned helplessness" that dominates the lives of sexually exploited children long after the initial abuse.[15]

Permitting adults to enjoy the products of sexual abuse of children is, in essence, an affront to the dignity of all children. In the words of one astute scholar, "Child pornography subjects individual children to actual violence and also uses their images to damage and devalue all children."[16] How much more, then, does it damage and devalue the children whom it actually depicts? And how much value could such children be said to have in a society where the existence of the materials created out of their pain had *constitutional* protection? It is, ultimately, impossible to provide adults a First Amendment "right" of private consumption and possession of child pornography while still maintaining an equal measure of dignity under that Amendment for the children exploited. Any "dialogue" that includes showing their pictures is "speech" which "by [its] very utterance inflict[s] injury". *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). *See* L. Tribe, *American Constitutional Law* 890, 914-915 (1988).

B. No Significant Privacy Or First Amendment Interests Depend On Protecting Private Possession Of Child Pornography.

What, though, of countervailing injuries, of losses to aduit freedom that flow from statutes like that of Ohio? Appellant has, in fact, rather little to say on this point, but does offer two areas

[14] Wyatt & Mickey, *The Support by Parents and Others as It Mediates the Effects of Child Sexual Abuse*, in *Lasting Effects of Sexual Abuse*, *supra* note 13, 211, 224.

[15] Silbert, *supra* note 1, at 29 (child pornography victims, even after many years, "have lost any sense of control over their lives and have accepted feeling trapped and victimized").

[16] Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1901 (1987).

for concern: (1) the "right to receive information"; and (2) the "privacy of the home". Appellant's Brief at 30. Listened to carefully, however, these echoes of *Stanley* are thin and hollow.

It is difficult, to begin with, to take seriously the claim that child pornography provides "information" or "ideas" in any sense that would have been meaningful to the Court in *Stanley*. 394 U.S. at 564. In *Ferber* the Court explicitly found that the First Amendment value of such depictions is "exceedingly modest, if not de minimis." 458 U.S. at 762; *id.* at 781 (Stevens, J., concurring in the judgment). And here, unlike the New York statute at issue in *Ferber*, Ohio has excluded from its prohibitions all material with any artistic, scientific, educational or other substantial value. Ohio Rev. Code Ann §2907.323 (A) (3) (a) (Anderson 1987). To what facts or concepts, then, will Appellant be denied access if the statute is enforced? On this subject his brief is silent. As the *Ferber* Court pointed out, Appellant would never even be in the position to possess and consume child pornography if laws against its production were fully effective. 458 U.S. at 762.

More fundamentally, however, child pornography is radically different from the adult obscenity at issue in *Stanley* because even if it can be described as meaningful communication, it is not *consensual* communication. While as a general matter it may be fair to say that children are often "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring), *no* child has even the slightest capacity to give meaningful consent to appearing in child pornography.[17] *See Massachusetts* v. *Oakes*, ___ U.S. ___, 105

[17] *See, e.g.*, Abel, *et al.*, *Complications, Consent and Cognitions in Sex Between Children and Adults*, 7 J. Law & Psych. 89, 96 (1984) ("when an adult requests that a child remove his or her clothes, that request is made from an unequal power base, [and] . . . children cannot give informed consent"); D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 55 (1986) ("Children frequently consent to behavior—sexual and otherwise—regardless of their own

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L.Ed.2d 493, 505n.2 (1989) (Scalia, J. concurring and dissenting). Thus Appellant is arguing for the right to "receive" a communication from an unwilling party—quite a different scenario from the context of *Stanley's* adult obscenity, where presumably all the "speakers," including the actors, took part willingly in its creation.[18] Especially when read in context with Fifth Amendment guarantees against forced expression, the First Amendment does not give anyone the right to receive "speech" from an unconsenting speaker.[19] Otherwise prohibitions against wiretapping and electronic eavesdropping, 18 U.S.C. §2511(1), would run afoul of the principle Appellant invokes.

Nor is it possible for Appellant to find any but the most literal comfort in *Stanley's* concern for "the privacy of one's own home". 394 U.S. at 565. It is precisely in the privacy of the home that most sexual abuse of children occurs: in 1985 over 75,000 *reported* cases.[20] It is in the privacy of the home that many counterfeiters hold communion with the printed materials and printing equipment whose possession is made subject to criminal prosecution. 18 U.S.C. §§472, 474, 480, 481, 485, 487-490. Do these activi-

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wishes, particularly when the request or command comes from an adult or much older child."); D. Finkelhor, *Child Sexual Abuse* 17-22 (1984); Finkelhor, *What's Wrong with Sex between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-695 (1979).

[18] *Stanley* did *not* consider the interests of the *performers* in the materials possessed by the defendant there, and it is quite possible that in circumstances of coercion or fraud those interests could alter its analysis. *See American Booksellers' Ass'n* v. *Hudnut*, 711 F.2d 323, 332-333 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[19] Thus *The Florida Star* v. *B.J.F.*, *supra*, nowhere suggests that the press has the *right* to know the name of a rape victim, and indeed spells out means for the state to protect that information. 105 L.Ed.2d at 455-456. That case and its predecessors only suggest the limits on government action to punish acquisition of such information lawfully, or from the government itself. *Id.* at 457. Under Ohio law, of course, it is wholly unlawful to create or circulate child pornography. Ohio Rev. Code Ann. §2907.323 (A) (1) (Anderson 1987).

[20] D. Finkelhor, *et al.*, *Nursery Crimes: Sexual Abuse in Day Care* 21-23 (1988).

ties fall under *Stanley's* language protecting the "right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home"? 394 U.S. at 565. The *Stanley* Court refused a direct response to this question, 394 U.S. at 568n.11, but the current Court has made it clear that the answer must be negative. *Bowers* v. *Hardwick*, 478 U.S. 186, 195-196 (1986). *See also id.* at 209n.4 (Blackmun, J., dissenting). Where an activity causes direct harm to another (here, the invasion of a child's privacy) and creates the grave risk of future harm (public circulation of the photographs or films), *Stanley's* concern for protecting the home loses its force.

Ultimately this case can be resolved into a contest between concrete, compelling privacy interests of sexually exploited minors, and amorphous, trivial claims to self-realization by adult voyeurs. Surely Appellant can acquire the information and understanding to which the First Amendment guarantees him access without gaping at the bodies of traumatized children.

II. AS CONSTRUED BY THE OHIO SUPREME COURT, THE STATUTE AT ISSUE MAY FAIRLY BE APPLIED TO APPELLANT.

Many, indeed the majority, of Appellant's attacks on the decision below rest not on his *Stanley* claims, but rather on technical grounds of only tangential interest to *Amici*. Because those technical assertions might obscure the central, vital question in the case—whether possession of child pornography may be proscribed—they are worth briefly addressing.

A. Authoritative Construction Narrowing An Arguably Overbroad Statute Does Not Exempt From Prosecution A Defendant Who Engaged In Unprotected Conduct.

Appellant claims that because the statute at issue originally swept all materials showing minors in a "state of nudity", it was (1) overbroad and (2) not capable of being constitutionally applied to him even after a narrowing construction by the state

courts. Appellant's Brief at 13-28. It is not necessary to address the first of those propositions because the second is so flatly incorrect.

Quite simply, "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); *Massachusetts* v. *Oakes, supra*, 105 L.Ed.2d at 502 (plurality opinion).[21] Only where such a construction deprives a defendant of "fair warning" is it constitutionally deficient. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1965). Here Appellant had ample notice that the material he was hoarding was deemed illicit, even if other, protected material seemed to be covered by the Ohio statute. He is in no different position from the defendants in *Hamling* v. *United States*, 418 U.S. 87 (1974), whose convictions under federal obscenity laws were upheld despite the narrowing construction placed on the broad language of those laws—which by their terms covered "lascivious" and "filthy", as well as "obscene" material—after their convictions. *Id.* at 110-117. The *Ferber* Court, of course, recognized this principle when it recognized the validity of state laws "authoritatively construed" under its guidelines. 458 U.S. at 764.

B. The Definition Of "Child Pornography" In The Challenged Statute As Construed Is Valid.

Appellant's assault on the Ohio statute eventually becomes an attack on *Ferber* itself. Thus he asserts that material involving a "lewd exhibition" of child's genitals may not be constitutionally included in a criminal definition of "child pornography" outside commercial contexts. Appellants Brief at 32-34. This, despite the quite explicit holding to the contrary in *Ferber* itself, 458 U.S. at

[21] Appellant badly misrepresents, Brief at 15-16, the views of Justice Scalia's separate opinion in *Oakes*, which held for five justices that an overbroad statute may not be saved by *legislative amendment* prior to a defendant's final appeal. 105 L.Ed.2d at 503-504. Such legislative action is utterly different, especially in a common law jurisdiction, from a judicial construction that is supported by "fair warning" in the language of the provision construed.

765, and the reaffirmation of that principle, in a wholly *noncommercial* context, by five members of the Court last Term in *Oakes*. 105 L.Ed.2d at 504-505 (Scalia & Blackmun, JJ.); *id.* at 505 (Brennan, Marshall, & Stevens, JJ.).

Less startling, but no more convincing, is Appellant's contention that the phrase adopted by the Ohio Supreme Court—"graphic focus on the genitals"—is outside the permissible bounds of *Ferber*. Appellant's Brief at 35. This language differs in form but not in substance from that of the New York statute approved in *Ferber*, 458 U.S. at 765 ("lewd exhibition of the genitals"). *Both* phrases are rooted in concern for protection of the privacy of a child's most intimate physical attributes from exploitation and stark public display. "Graphic focus" on genitals goes far beyond the "mere nudity" protected by *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213 (1975), especially in a context where works with any kind of serious artistic, scientific, or other value are exempted from prosecution. Ohio Rev. Code Ann. §2907.323(A) (3) (a) (1987). Indeed, "graphic focus" is a more concrete, and so fairer, formulation than the value-laden term "lewd".

If, as Appellant fears, the definition of "child pornography" adopted by Ohio contains the potential for prosecution of constitutionally protected speech, courts will have the opportunity to adjust it on a case-by-case basis. Here, however, he neither claims that the photographs in his possession were not "lewd exhibitions" of a child's genitals, nor demonstrates that the phrase "graphic focus" on genitals will apply to more than a "tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. He thus has utterly failed to sustain an overbreadth attack on the challenged law. *Oakes*, 105 L.Ed.2d at 505 (Scalia, J., concurring and dissenting); *New York State Club Ass'n* v. *New York City*, ___ U.S. ___, 101 L.Ed.2d 1, 16-17 (1988).

Appellant fails, as well, to find a convincing argument that the challenged statute is "underinclusive" because of exemptions

for depictions possessed by parents, with parental consent, or for artistic purposes. Appellant's Brief at 39. It is hardly irrational for a state to conclude that parents are in the best position to protect their children's privacy interests. *See Faloona* v. *Hustler Magazine*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied* 94 L.Ed.2d 151 (1987). Mere possession of child pornography by parents or with their approval is less likely, moreover, to result in its eventual circulation to a wide audience. Further, it is at least plausible to argue that children used in depictions involving a "serious contribution to art or science" are far less likely to suffer the same degree of harm as those used in blatantly exploitative material. *Ferber*, 458 U.S. at 776-777 (Brennan, J., concurring). Ohio's judgment on these matters thus seems well within reasonable legislative discretion.

CONCLUSION

The Attorney General's Commission on Pornography, two separate Canadian commissions, and a substantial number of states have determined that possession of child pornography should be a criminal act.[22] Whether states choose to go so far to vindicate and protect sexually exploited children is a matter for careful legislative deliberation. In that debate, however, it is not a legitimate position to claim that the First Amendment guarantees the permanent existence of child pornography once it reaches the living room of a purchaser. Children raped or degraded on camera deserve at least the hope of smashing the graven image of their nightmare.

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

GREGORY A. LOKEN*
INSTITUTE FOR YOUTH ADVOCACY
COVENANT HOUSE
460 W. 41st Street
New York, New York 10036
(212) 613-0349

Judith Drazen Schretter
NATIONAL CENTER FOR MISSING
& EXPLOITED CHILDREN
2101 Wilson Blvd., Suite 550
Arlington, Virginia 22201
(703) 235-3900

Counsel for Movants-*Amici Curiae*

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[22] Attorney Gene.al's Comm'n on Pornography, *Final Report* 648 (1986); 2 *Pornography and Prostitution in Canada: Report of the Special Comm. on Pornography and Prostitution* 630-631 (1985); 1 *Sexual Offences Against Children: Report of the Comm. on Sexual Offences Against Children and Youths Appointed by the Attorney General of Canada* 102-103 (1984). For a partial listing of state statutes prohibiting child pornography possession see Potuto, *supra* note 8, at 18n.18.

* Counsel of Record